VGV sought a timely panel rehearing pointing out that:

> "[A] rehearing is warranted because *Azul-Pacifico, Inc. v. City of Los Angeles* 973 F.2d 704 (9th Cir. 1992) and *Golden Gate Hotel Ass'n v. City and County of San Francisco* 18 F.3d 1482 (9th Cir. 1994) ('*Golden Gate*') do not constitute binding Ninth Circuit precedent which the Court was bound to follow. Both cases are factually distinguishable from the case at bar in, at least, one very important respect. In each of these cases, the plaintiffs' claims were against local public agencies, *not* the state itself. In each case plaintiffs had a remedy under 42 *U.S.C.*§ 1983 to vindicate their constitutional claims but failed to utilize the federal statutory remedy Congress had provided for this purpose in 42 *U.S.C.*§ 1983. Accordingly, the *Azul-Pacifico* and *Golden Gate* courts concluded that, having failed to exhaust this statutory remedy, the plaintiffs could not invoke the District Court's federal question jurisdiction under 28 *U.S.C.*§ 1331 to consider a 'taking' claim against these local entities directly under the Constitution itself.
>
> "On the other hand, as this Court correctly points out, binding precedent of the Supreme Court holds that a state is not a 'person' subject to suit under 42 *U.S.C.*§ 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). ('*Michigan State Police*'). Therefore, unlike the plaintiffs in *Azul-Pacifico* and *Golden Gate*, VGV had no remedy to pursue under 42 *U.S.C.*§ 1983.
>
> "The issue presented in the case at bar is whether a person in VGV's position who could not, under

controlling Supreme Court decisions, seek just compensation from the State of California via 42 *U.S.C.* § 1983, has the right to invoke the District Court's jurisdiction under 28 *U.S.C.* § 1331 to seek full just compensation from the State under the Fifth and Fourteenth Amendments based on *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897) ('*Chicago, Burlington*') and its progeny including *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172 (1985) ('*Williamson County*') and *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) ('*Suitum*'). Neither the *Azul-Pacifico* nor *Golden Gate* courts had any reason to consider this issue or to consider whether the principles articulated in *Chicago, Burlington*, *Williamson County* and *Suitum* precluded the State from defending such a suit on the basis of sovereign immunity since the Fourteenth Amendment, not Congress, has abrogated the States' sovereign immunity as to claims for an uncompensated taking of private property for public use.

"For these reasons, VGV suggests this Court was not bound by the statements in *Azul-Pacifico* that 'a litigant complaining of a violation of a constitutional right must utilize 42 *U.S.C.*§ 1983' (*Azul-Pacifico*, *supra* 973 F.2d at 905) and it was not bound by the statement in *Golden Gate* that 'all claims of unjust taking ha[ve] to be brought pursuant to Section 1983. . .' (*Golden Gate, supra,* 18 F.3d at 1486.) Those statements taken in context of the facts and issues presented in those cases can only be read to refer to suits against political subdivisions of a state

which *are subject to suit* under 42 *U.S.C.*§ 1983." (App. E at 35a-37a.)

VGV also suggested that:

> "If the holdings in *Azul-Pacifico* and *Golden Gate* can only be reconsidered by an *en banc* court, one should be convened for the reason stated above. If these cases truly stand for the proposition that the Fifth Amendment cannot be enforced against any state, this is an issue of exceptional importance that merits rehearing by an *en banc* court under *FRAP*, Rule 35." (App. E at 40a.)

VGV's Petition for Rehearing and Suggestion for Rehearing *En Banc* were both denied. (App. A.) By doing so, the Ninth Circuit ignored the principles this Court set down in *Chicago, Burlington* and *Williamson County* to govern federal "taking" jurisprudence and misapplied this Court's holding in *Michigan State Police* to reach the completely unacceptable conclusion that the Fifth Amendment only requires the payment of "just compensation" by a state if a state's lawmakers do not have another use for the funds needed to pay full compensation.

That conclusion also flies in the face of all "just compensation" cases this Court has rendered since *Chicago, Burlington*. There, it was held: 1) that the Fifth Amendment's just compensation requirement was binding on the States and their local public agencies under the Fourteenth Amendment; 2) that the federal courts lacked subject matter jurisdiction to restrain a state or one of its local entities from taking private property for public use. The only possible federal remedy that could be provided under the Fifth Amendment was an award of "just compensation" money damages; and 3) that the

Fifth Amendment was not violated in that case because the state itself provided a reasonable state remedy by which the injured party could recover monetary damages for any loss the "taking" had caused.

In *Williamson County*, this Court limited the federal court's jurisdiction over "taking" claims by requiring, based on the wording of the Fifth Amendment, that litigants had to exhaust the state's "just compensation" remedy before seeking relief in federal court under 42 *U.S.C.*§ 1983 (if the defendant was not a state) or directly under the Fifth and Fourteenth Amendments if a state was the defendant.

VGV complied with that requirement. Although not necessary to consideration of the narrow ground upon which the Ninth Circuit dismissed VGV's case, VGV has included in Appendices F to H the briefs of the parties presented to the Ninth Circuit on the exhaustion issue as well as the State's other defenses. There is essentially no dispute as to what occurred in this case and only issues of law are presented. This material also bears directly on the concerns articulated by the late Chief Justice Rehnquist in his concurring opinion in *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S.Ct. 2491 (2005).

In summary, VGV secured a state court judgment based on a unanimous jury verdict against the Port District that was entered on January 31, 1991, awarding compensatory damages in excess of $30 million, plus interest at the rate of 10% per annum, for the wrongful taking of VGV's long term lease in the Ventura Harbor.

In 1993, the California Court of Appeal reduced the compensatory award to $15.6 million and affirmed the judgment in all other respects, noting that to absolve the

District from liability for conduct "which would make the very contract itself and the security mentioned therein wholly valueless" would be tantamount to conferring on the District a "license to steal" private property for public use. (*Ocean Services Corp. v. Ventura Port District* 15 Cal.App.4th 1762, 19 Cal.Rptr.2d 750 (1993).)

On September 20, 1993, the day after the California Supreme Court denied the Port District's Petition for Review of that decision, the Port District filed in Bankruptcy Court under Chapter 9 claiming it was insolvent because Article XIII A of the California Constitution prohibited it from levying taxes to pay the judgment. As a result of those proceedings, in September 1998 and after the district court had held that Article XIII A of the California Constitution prohibited any levy of local taxes to pay the judgment, the judgment was conditionally discharged pursuant to a plan that provided VGV a cash payment of $7.7 million (an amount that did not even cover the accrued interest on the $15.6 million judgment) and that further provided that if the Ninth Circuit reversed the district court's determination that Article XIII A of the California Constitution prohibited the levy of local taxes to pay the balance owing on the judgment the Port District would levy such taxes and pay the proceeds to VGV to satisfy the full judgment.

After the state and federal issues were briefed and argued before the Ninth Circuit, the Ninth Circuit observed that:

> "Nonetheless, we recognize that a California court has barred application of Article XIII A when an inverse condemnation judgment was at issue. See *F & L Farm Co. v. City Council*, 65 Cal.App.4th 1345, 77 Cal.Rptr. 2d 360 (Cal. Ct. App. 1998). VGV argues that F & L Farm should be extended to bar the

> enforcement of Article XIII.A in this case to permit the County to satisfy its judgment by levying additional property taxes. Related to this argument, VGV argues that Article XVI's involuntary obligation exception, discussed in F & L Farm, should be applied in the Article XIII A context. See, generally, *County of Los Angeles v. Bryam*, 36 Cal.2d 694, 227 P.2d 4 (Cal. 1951) (in bank); *Arthur v. City of Petaluma*, 175 Cal. 216, 165 P. 698 (Cal. 1917); *Lewis v. Widber*, 99 Cal. 412, 33 P. 1128 (Cal. 1893). At this time, the California courts have not extended the involuntary obligation exception of Article XVI in this manner." (*Ventura Group Ventures, Inc. v. Ventura Port District*, 179 F.3d 840, 844-845 (CA 9th Cir 1999).)

Accordingly, the Ninth Circuit, before reaching the issues VGV raised under the United States Constitution, certified to the California Supreme Court the question:

> "Does Article XIII.A of the California Constitution (adopted in 1978 by statewide initiative as Proposition 13) prohibit a county from levying property taxes in excess of the one percent limit, pursuant to California *Harbors and Navigation* Code § 6361 to pay a money judgment as required by California *Government Code* §§ 970-971?" (*Ventura Group Ventures, Inc. v. Ventura Port District, supra*, 179 F.3d at 841.)

After accepting the certification of this state law issue, the California Supreme Court responded in *Ventura Group Ventures, Inc. v. Ventura Port District, et al.* 24 Cal.4th 1089 (Cal. 2001). In that opinion, it concluded that it need not consider "whether an exception for judgments resulting from nondiscretionary acts should be read into Article XIII A" for

one straight forward reason. The Port District's "decision to violate the implied covenant of good faith and fair dealing" in order to evict OSC and acquire all of OSC's interest in the 50 year lease for public use was a "discretionary act" under state law, and state statutes (Cal. *Rev. & Tax. Code*, §§ 2205, 2271; *Gov. Code* §§ 970.8, 971) enacted before Proposition 13 provided that local property taxes could not be levied to pay a judgment arising from a "discretionary act." (*Ventura Group Ventures, Inc. v. Ventura Port District, et al., supra,* 24 Cal.4th at 1100-1101.)

Although not necessary to resolve VGV's claim, the California Supreme Court went on to disapprove the Court of Appeal's decision in *F&L Farm Company v. City Council of the City of Lindsay,* 65 Cal.App.4th 1345, 77 Cal.Rptr.2d 360 (Cal. Ct. App. 1998) referred to in the Ninth Circuit's certification and held that Articles XIII.A, XIII.C and XIII.D of the California Constitution (adopted as Proposition 13 in 1978 and Proposition 218 in 1996) prohibited the levy of additional local taxes to pay judgments arising from "non discretionary acts" such as inverse condemnation and torts. (*Ventura Group Ventures, Inc. v. Ventura Port District, et al., supra,* 24 Cal.4th at 1102-1104.)

After receipt of this opinion, the Ninth Circuit requested that the parties submit supplemental briefs regarding the effect of the California Supreme Court's opinion on the remaining issues presented in the case before it. VGV took the position that the Ninth Circuit was required to independently consider the merits of two of VGV's federal constitutional claims which, if decided in VGV's favor, would require the Ninth Circuit to declare California's statutory and constitutional prohibitions on payment of judgments invalid under the federal constitution.

The first was VGV's contention that state law, as articulated by its highest court, violated the Due Process Clause of the Fourteenth Amendment. To give the taxpayers of the judgment debtor the option to decide whether a judgment against that entity would provide just compensation for property the local entity had taken offends any notion of customary procedural due process.

Second, VGV maintained that the federal courts had the obligation to declare these laws unenforceable under the Guarantee Clause. California's statewide lawmakers, be they elected representatives or taxpayers exercising their initiative power, simply cannot provide a representative, republican form of statewide government, if they delegate the enforcement of judgments rendered by either state or federal courts to local taxpayers.

In addition to these outcome determinative issues, VGV also urged the Ninth Circuit to address and correct the California Supreme Court's unsolicited, unnecessary, and erroneous comments on federal bankruptcy law as they related to a potential future "just compensation taking" claim against the State of California for the balance owed on the judgment. It declined, however, to render an advisory opinion on the viability of a future taking claim against California.

The Ninth Circuit did, however, agree that the California Supreme Court's comments on the Guarantee Clause and the Due Process Clause were not binding on it. After independently considering those issues, it found neither the Guarantee Clause nor the procedural aspects of the Due Process Clause precluded California from prohibiting the levy of local taxes to pay money judgments against local public entities awarding just compensation and, based on the

California Supreme Court's state law answers, affirmed the judgment of the District Court.

After VGV's Petition for Rehearing was denied, it became necessary for VGV to decide whether the "state-litigation requirement" prerequisite to a "taking" claim in federal court imposed by *Williamson County* required that VGV seek review of the Ninth Circuit's opinion before this Court before VGV would possess a justiciable "taking" claim against the State of California. It also became necessary for VGV to decide whether the failure to seek review before this Court of the Ninth Circuit's rejection of VGV's Guarantee Clause and Due Process Clause challenges to the enforcement of Proposition 13 might be viewed as an attempt to sidestep this Court's exclusive appellate jurisdiction as to these issues that the *Rooker-Feldman* doctrine does not condone, and which could also provide the State an argument under *Suitum* that had VGV sought review from this Court, rather than running back to district court to sue the State of California, it was possible that VGV would have secured full compensation from the Port District. VGV ultimately decided that a Petition for Writ of Certiorari was required in order to preserve its right to proceed against the State of California on its taking claim and one was filed with this Court on December 20, 2001. It was denied on March 18, 2002.

After all efforts to collect the judgment from the Port District were exhausted, the present action against the State of California was filed on November 15, 2002. VGV's complaint set forth these prior proceedings (App. D at 13a to15a.) and alleged:

> "The prior judicial proceedings have conclusively determined the Defendant State possessed the right and power under the United States Constitution to enact

and enforce state laws giving the constituents of its local political subdivisions the power to decide whether compensatory judgments against those entities would be paid in full and which would be subject to discharge under Chapter 9. By the present action, VGV seeks a judgment against Defendant State for payment of the balance of just compensation the District owed on the judgment but which has been taken from it, without just compensation, by the operation of these state laws." (App. D at 15a.)

CERTIORARI IS PROPER IN THIS CASE

1. Whether or Not a State Is Subject to Private Party Just Compensation Claims in Federal Courts Is a Critically Important Issue Deserving of this Court's Attention.

The Ninth Circuit's opinion in essence treats 42 *U.S.C.*§ 1983 as a Congressional abrogation of the federal courts', power to enforce the Fifth and Fourteenth Amendment's "just compensation" requirement against the states. This Congress cannot do.

Since "the ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch" (*Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80 (2000) ("*Kimel*") "Congress cannot decree the substance of the Fourteenth Amendment's restrictions on the States . . ." *Kimel, supra*, 528 U.S. 62 at 80.

This Court's decisions in *Chicago, Burlington, Williamson County* and *Suitum* decree "the Fourteenth Amendment's substantive meaning" as it relates to just compensation claims

against a state, and these decisions must be followed by the lower federal courts in the case at bar.

This Court has long held that as to the federal government "[t]he Constitution has declared that just compensation *shall* be paid." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327; 13 S.Ct. 622, 626; 37 L.Ed. 463 (1893). (Emphasis added.) The Constitution itself provides both the [just compensation] cause of action and the remedy. *Jacobs v. United States*, 290 U.S. 13, 16, 54 S.Ct. 26, 27, 78 L.Ed. 142 (1933). "[G]overnment action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315, 107 S.Ct. 2378, 2386 (1987) ("*First English*") quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). For this reason, the Fifth Amendment's "just compensation" remedy has been referred to as "self-executing" requiring no Congressional legislation to implement it. *First English, supra*, 482 U.S. at 314.

The deference given by this Court to the Tucker Act, which Congress enacted to provide a just compensation remedy is not based on the federal government's sovereign status, but on the wording of the Fifth Amendment itself. As pointed out in *Williamson County*, the Fifth Amendment does not require:

> "that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a " 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125, 95 S.Ct. 335, 349, 42

> L.Ed.2d 320 (1974) . . . If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Williamson County, supra*, 473 U.S. at 194-195.

For this reason and this reason alone, this Court has held "that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 *U.S.C.* §1491." *Williamson County, supra*, 473 U.S. at 195. For precisely the same reason, this Court concluded that "[i]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Ibid.* Then and only then can the property owner state a federal claim under the Constitution (if the State is the defendant) or under 42 *U.S.C.* §1983 (if a local agency is the defendant).

The Ninth Circuits decisions in *Azul-Pacifico* and *Golden Gate* upon which it relied in dismissing VGV claims applied these same principles. In cases where a local entity is the defendant the plaintiff has a reasonable remedy to secure just compensation under 42 *U.S.C.* §1983 and the plaintiff must utilize that remedy rather than bringing a taking claim under the Constitution itself. Of course, that federal statutory remedy is not available against the states. Thus, the only way to enforce the mandatory "just compensation" requirement against the a state is by an action directly under the Fifth and Fourteenth Amendments. As already mentioned, unlike the enforcement of civil liberties under 42 *U.S.C.* §1983 in cases like *Michigan State Police*, injunctive relief against State officials to prohibit the taking of private property is not

available under *Chicago, Burlington* and its progeny. The only means to enforce the Fifth Amendment in such a case is an award of just compensation.

It also bears mention that the State of California has the ability to minimize the effect a decision in VGV's favor on this point of law by simply adopting an amendment to its State's Constitution to make it clear that Proposition 13 was not intended to relieve local entities from levying local taxes to pay for property taken for public use without just compensation.

2. Certiorari Should Also Be Granted to Address the Issues Raised by Justice Rehnquist Regarding the "State Litigation Requirement" Imposed by *Williamson County* Before Access to the Federal Courts Is Allowed.

In his concurring opinion in *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S.Ct. 2491, 2510-2511 (2005), the late Chief Justice Rehnquist expressed some deep concerns as to the direction federal taking jurisprudence was moving which could eventually destroy any federal court causes of action for a taking. In calling for a re-examination of *Williamson County*'s requirement that state litigation seeking just compensation must be pursued to finality before resorting to federal court he offered the following reflections:

> "I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. Here, no court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and

resolving the issue could not benefit petitioners. In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S.Ct. 2491, 2510-2511 (2005) (Rehnquist, C.J., concurring in judgment).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 03-57004

[Filed October 25, 2005]

VENTURA GROUP VENTURES, INC., a California corporation, Plaintiff-Appellant,	)	D.C. No. CV-02-08785-HLH Central District of California, Los Angeles
v.	)	
STATE OF CALIFORNIA, Defendant-Appellee.	)	

ORDER

Before: FARRIS, D,W. NELSON, and TALLMAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing; Judge Tallman votes to deny the petition for rehearing en banc, and Judges Farris and Nelson so recommend. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P.35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX B

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 03-57004

[Filed September 16, 2005]

VENTURA GROUP VENTURES, INC., a California corporation, Plaintiff-Appellant;	)	D.C. No. CV-02-08785-HLH Central District of California, Los Angeles
v.	)	
STATE OF CALIFORNIA, Defendant-Appellee.	)	

JUDGMENT

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 03-57004

[Filed September 16, 2005]

VENTURA GROUP VENTURES, INC., a California corporation, Plaintiff-Appellant;	)	D.C. No. CV-02-08785-HLH Central District of California, Los Angeles
v.	)	
STATE OF CALIFORNIA, Defendant-Appellee.	)	

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding.

Argued and Submitted July 11, 2005
Pasadena, California

Before: FARRIS D.W. NELSON and TALLMAN, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

Plaintiff Ventura Group Ventures, Inc. appeals from the grant of summary judgment to the State of California in this action alleging inadequate compensation for a taking. The district court dismissed on the ground that takings claims must be brought pursuant to 42 U.S.C. § 1983, but that the State may not be sued under that statute because it is not a "person" as defined therein. We affirm.

The action brought by VGV is foreclosed. As this Court has held in the context of a takings action, "[p]laintiff[s] ha[ve] no cause of action directly under the United States Constitution.... [A] litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." *Azul-Pacifico, Inc. v. City of Los Angeles,* 973 F.2d 704, 705 (9th Cir. 1992); *see also Golden Gate Hotel Ass'n v. City and County of San Francisco,* 18 F.3d 1482, 1486 (9th Cir. 1994) ("[A]ll claims of unjust taking ha[ve] to be brought pursuant to Section 1983") (citing *Azul*). And states may not be sued under. § 1983 because they are not "persons" within the meaning of the statute. *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989). We are bound to follow binding Supreme Court precedent and prior decisions of this circuit.

AFFIRMED.

APPENDIX C

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV02-8785-HLH (Ex)

[Filed October 27, 2003]

VENTURA GROUP VENTURES, INC.,
Plaintiff,

v.

STATE OF CALIFORNIA,
Defendant.

ORDER DISMISSING ACTION

This action is dismissed with prejudice.

This Order is a final judgment for purposes of Fed.R.Civ.P. 54(a). It shall be entered pursuant to Fed. R.Civ. P. 58 and 79(a), and served upon the parties.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case Nos: CV 02-8785 HLH (Ex)

Date: October 27, 2003

Title: VENTURA GROUP VENTURES, INC v. STATE OF CALIFORNIA

PRESENT

HON. HARRY L. HUPP, JUDGE

Carolyn Trump	Cynthia Mizell
Deputy Clerk	Court Reporter

ATTORNEY(S) PRESENT FOR PLAINTIFF:

John Johnson (Heily & Blase)

ATTORNEY(S) PRESENT FOR DEFENDANT:

Louis R. Mauro (Senior Assistant Attorney General)
Kenneth R. Williams (Supervising Deputy Attorney General)
Robert D. Wilson (Deputy Attorney General)

PROCEEDINGS: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

ORDER

The motion of defendant State of California (hereafter State) for summary Judgment is granted. The action is dismissed by judgment signed and filed this date. The cross motion of plaintiff Ventura Group Ventures, Inc. (VGV) for partial summary judgment is denied.

This action is a sequel to and follows action no. CV 94-3262 HLH, which was affirmed in Ventura Group Ventures v. Ventura Port District 9Cir'99 179 F3d 840. The previous federal action itself was an outgrowth of a still previous state court action in which VGV (a successor to Ocean Services Corp.) obtained a final judgment against Ventura Port District (VPD) in the sum of $15,560,169 (Ocean Services Corp. v. Ventura Port District '03 15 CA4th 1762, 19 CR2d 750). The previous federal action was an attempt by VGV to enforce its judgment and involved a myriad of issues. The only issue relevant here, however, was the contention that the County of Ventura had a statutory duty to levy a property tax in sufficient amount to pay the judgment. This court held, affirmed on appeal, that Article XIII (hereafter Prop. 3) of the California Constitution prevented the levying of a property tax without a vote or 2/3 of the people. The Ninth Circuit affirmed, after referring the question to the California Supreme Court (Ventura Group Ventures v. Ventura. Port District '01 24 C4th 1089, 104 CR2d 53) This suit followed, with VGV contending that the failure of the State to provide a method to *enforce* its judgment, such as the levying of a property tax which was the method of enforcement prior to Prop 13, was a taking of property for which the State was liable.

The State raised a number of affirmative defenses, which are the subject of these motions. Particularly, State contends, among other things, that it may only be sued under 42 USC § 1983, but that it is immune under the Eleventh Amendment from such a suit, that it in any event has Eleventh Amendment immunity, that the statute of limitations has run, that it is immune under the Rooker-Feldman doctrine, that the action is barred by res judicata, and that the claim is not ripe. Plaintiff's motion is the converse of defendants--i.e., that none of the affirmative defenses has validity. The question of

whether there was, in fact, a taking is not presented in these motions and the court does not reach that question.

The present state application of Ninth Circuit law has a two fold application. It is clearly held by the most recent Ninth Circuit authority that a takings claim must be presented through an action brought pursuant to 42 USC § 1983. (Azul-Pacifico v. City of Los Angeles 9Cir '92 973 F2d 704) (Azul II).) Azul II was a "takings" case. The court said: "Plaintiff has no cause of action directly under the United States Constitution (i.e., under the Fifth Amendment). We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 USC § 1983. [Citations]." The action was then dismissed for lack of subject matter jurisdiction. That Azul II was not a stray maverick was made clear in Golden Gate Hotel Assn. 9Cir '94 18 F3d 1482, where the court said, "The holding of [Azul I ha[s] been supplanted by Azul II, which established that all claims of unjust taking had to be brought pursuant to Section 1983 ...." Accordingly, this court must treat plaintiff's complaint as one under § 1983. However, there is a "Catch 22." The State may not be sued under §1983 because it is not a "person" within the meaning of § 1983. This was true even before Seminole Tribe of Indians '96 517 US 44, 134 LEd2d 252. (Quern v. Jordan '79 440 US 332, 59 LEd2d 358; Will v. Michigan '89 491 US 58, 105 LEd2d 45). It is even more true now that Congress may not "waive" the state's sovereign immunity for federally created claims. (Seminole Tribe supra; Mitchell 9Cir'00 209 F3d 1111) Left to its own devices, the court would not reach this conclusion. This suit is brought under the Fifth Amendment, which is binding on the states through the Fourteenth Amendment. (Chicago B. & O R Co., 1897 166 US 226, 41 LEd 979; Webb's Fabulous Pharmacies Inc. '80 449 US 155, 66 LE2d 35.8) The power of the Fourteenth Amendment should be sufficient to abrogate the

state's sovereign immunity, and the procedural neatness of requiring such actions to be brought under § 1983 should not apply to something as fundamental as the takings clause of the Fifth Amendment. However, the present state of the law in the Ninth Circuit is that takings cases must be brought § 1983, and the state may not be sued under § 1983. Seminole Tribe has wiped out a lot of potential claims against the state (i.e. copyright, patent, and trademark), *and* this appears to be another such situation.

There is no point in discussing the other affirmative defenses. The immunity of the state to be sued under § 1983, and the requirement that takings cases be so brought, is enough to strangle this infant law lawsuit before it really gets going. Judgment is signed and filed for defendant this date.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 03-57004

[Filed November 14, 2002]

VENTURA GROUP VENTURES, INC., a California corporation,
Plaintiff,

v.

STATE OF CALIFORNIA,
Defendant.

COMPLAINT FOR JUST COMPENSATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

and

DEMAND FOR JURY TRIAL

NATURE OF THE ACTION

This action is brought by Plaintiff Ventura Group Ventures ("VGV") against the State of California ("Defendant State") under the Fifth and Fourteenth Amendments to the United States Constitution to recover just compensation for private property Defendant State has taken for public use. This action follows and arises out of VGV's unsuccessful efforts to secure payment of the just compensation awarded to its assignor Ocean Services Corporation ("OSC") against the Ventura Port District, ("District"), a political subdivision of Defendant State, after OSC's valuable long term lease in the Ventura Harbor was taken from it by the District in breach of the implied covenant of good faith and fair dealing.

On August 19, 1993, VGV secured a final state court judgment against the District, awarding VGV compensatory damage in the sum of $15,560,169 ("$15.6 million") together with interest at the rate of 10% per annum from January 31, 1991 until paid. On September 20, 1998, a federal bankruptcy court approved a plan of debt adjustment for the District which required the District to pay the principle sum of $7,739,821 ("$7.7 million") to VGV and provided that the balance of the just compensation awarded by the judgment, together with accrued interest under the judgment, would be discharged, under federal law, if state law prohibited the District from levying taxes or assessments to pay the balance it owed on the judgment. That issue of state law was then before the Ninth Circuit Court of Appeals in the state declaratory judgment action VGV had filed which had been removed to federal court. On June 29, 1999, in a reported opinion styled *Ventura Group Ventures, Inc. v. Ventura Port District* 179 F.3d 840 (9th Cir.1999), the Ninth Circuit certified the following questions to the Supreme Court of California:

1. Does Article XIII A of the California Constitution (adopted in 1978 by statewide initiative as Proposition 13) prohibit a county from levying property taxes, in excess of the one percent limit, pursuant to §California Harbors and Navigation Code 6361 to pay a money judgment as required by §§California Government Code 970-971?

2. Does a port district created pursuant to §California Harbors and Navigation Code 6210 have independent authority to impose assessments under §California Harbors and Navigation Code 6365(d)(2) in order to raise the funds needed to satisfy a judgment obtained against it?

On February 15, 2001, the California Supreme Court, in a reported opinion styled *Ventura Group Ventures, Inc. v. Ventura Port District, et al.* 24 Cal.4th 1089 (Cal. 2001), rejected VGV's suggestion that Proposition 13 should be narrowly construed to avoid serious questions as to its validity under the United States Constitution, finding that the intent of the statewide electorate to bring to an end the local public entity practice of "budgeting first, taxing later" was absolutely clear, leaving no doubt that under state law the District could not avail itself of taxes or assessments to pay the judgment unless two-thirds of its local voters voted to subject themselves to taxation for this purpose. On August 29, 2001, the Ninth Circuit in an unreported Memorandum Decision accepted the California Supreme Court's answers to its certified questions of state law and affirmed the lower court's judgment declaring that state law prohibited the District from levying the taxes or assessments to enable it to

pay the full amount of the compensation VGV had been awarded against the District.

The Ninth Circuit also rejected VGV's argument that the Guaranty Clause of the United States Constitution denied Defendant State the governmental power under to enact any state law that made the payment of just compensation by a local public entity dependent on the popular vote of local residents, property owners or taxpayers. It further rejected VGV's suggestion that the enforcement of such laws by the Defendant State to deprive judgment creditors of the recognized and time honored judicial process to enforce such a judgment, i.e., a court-mandated tax levy denied VGV and other judgment creditors procedural due process in violation of the United States Constitution's Fourteenth Amendment.

The holding of the Ninth Circuit on these issues of federal law became final on March 18, 2002 when the United States Supreme Court denied VGV's Petition for Writ of Certiorari.

The prior judicial proceedings have conclusively determined the Defendant State possessed the right and power under the United States Constitution to enact and enforce state laws giving the constituents of its local political subdivisions the power to decide whether compensatory judgments against those entities would be paid in full and which would be subject to discharge under Chapter 9. By the present action, VGV seeks a judgment against Defendant State for payment of the balance of just compensation the District owed on the judgment but which has been taken from it, without just compensation, by the operation of these state laws.

PARTIES

1. VGV is a corporation whose shareholders are all former shareholders in OSC. In April 1990 VGV purchased and acquired ownership of OSC's claims against the District. VGV thereafter successfully prosecuted those claims to final judgment against the District. At all relevant times, both VGV and its assignor OSC were corporations incorporated under the laws of the Defendant State.

2. At all relevant times, Defendant State of California was one of the states of the United States.

JURISDICTION

3. Jurisdiction of this Court is invoked pursuant to 28 USC section 1331 which gives the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

4. The prior judicial proceedings against the District have conclusively determined that the Defendant State had the right and power under the United States Constitution to allow the constituents of its local political subdivisions the governmental power to determine, on a case by case basis, whether tax revenues would be raised to pay state and federal court judgments against such entities. The prior proceedings have also determined that it is consistent with the Defendant State's sovereign powers under the United States Constitution for it to allow and/or require its local political subdivisions, in cases where local voter approval to raise tax revenues for this purpose is not forthcoming, to secure the discharge of that portion of any such judgment that cannot be paid without additional tax revenues in a proceeding under Chapter 9 of the United States Bankruptcy Code ("Chapter 9").

5. Whether or not Defendant State must pay just compensation under the Fifth Amendment when its laws, that deny its local political subdivisions the power of taxation (in the absence of voter approval), are employed, as they were here, to secure the discharge of a political subdivision's obligation to pay full and just compensation awarded a property owner after its property was taken for public use was not determined in these prior proceedings against the District.

6. This Court is not deprived of jurisdiction over this federal question by the *Rooker Feldman* doctrine for two reasons. First, this action is predicated on the finality of the determination made in the action against the District that Defendant State had the governmental power under the United States Constitution to give local property owners and taxpayers unfettered discretion to determine which compensatory damage judgments entered by the state and federal judiciary against local governmental entities in the State of California would be paid in full and which would be subject to discharge under federal bankruptcy law. Second, neither the Ninth Circuit upon receipt of the California Supreme Court's response to the certified questions of state law nor the United States Supreme Court in the exercise of its appellate jurisdiction under 28 U.S.C. § 1257 on VGV's Petition for Writ of Certiorari had Article III jurisdiction to comment on or correct the California Supreme Court's advisory statement that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment . . ." *Ventura Group, supra,* 24 Cal.4th 1089 at 1101. This Court is the first court with subject matter jurisdiction and the duty to address and determine that federal question.

FURTHER PURSUIT OF STATE LAW REMEDIES IS FUTILE

7. VGV has exhausted all judicial remedies available under state law to recover from the District the full amount of the just compensation due under the judgment. Those judicial proceedings have concluded without providing for the payment of the full amount of just compensation that was awarded against the District for the taking of OSC's leasehold estate in the Ventura Harbor.

8. Although this Court would normally lack jurisdiction to consider VGV's federal Fifth Amendment "taking" claim against the Defendant State until after VGV has sought just compensation from the Defendant State under Article I, § 9 of the California Constitution in state court and has been denied just compensation there. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City* 473 U.S. 172, 190, 194 (1985). The rule of *Williamson County* is not applicable here because it would be futile to proceed against Defendant State in state court.

9. In its response to the certified questions of state law, the California Supreme Court made it clear that as far as Defendant State was concerned, the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment..." *Ventura Group, supra,* 24 Cal.4th 1089 at 1101. Although, this advisory holding on an issue of federal law was not subject to review by either the Ninth Circuit or the United States Supreme Court in the prior proceedings, and is not binding on any federal court, including this Court, it would be binding on the lower state courts.

10. Were VGV to bring an inverse condemnation action in state court seeking just compensation against Defendant State, under Article I, § 9 of the California Constitution, the lower state courts and ultimately the California Supreme Court would hold consistent with the California Supreme Court's advisory comment regarding the Fifth Amendment that "the discharge of the District's debts in a bankruptcy proceeding" would also not constitute a taking in violation of Article I, section 19 of the California Constitution.

11. VGV has exhausted all available state remedies to secure just compensation against the District and any further state court proceedings against the Defendant State under Article I, section 19 of the California Constitution would be futile.

VGV'S FIFTH AMENDMENT CLAIM IS TIMELY

12. VGV's claim against the Defendant State did not accrue and become ripe for consideration by this Court until after VGV had exhausted its judicial remedies, both state and federal, to seek recovery against the District under the state statutes governing the enforcement of judgments against political subdivisions of Defendant State that preexisted Article XIII A. That occurred on March 18, 2002 when the United States Supreme Court denied VGV's Petition for Writ of Certiorari directed to the Ninth Circuit. At that point, and not until then did VGV's taking claim against Defendant State accrue and become actionable in federal court.

13. The Article III case or controversy as to whether the laws of Defendant State, as construed by its highest court, have forced on VGV alone a public burden which, in all fairness and justice, should have been borne by the public as a whole for which the Defendant State must pay just

compensation under the Fifth and Fourteenth Amendments to the United States Constitution, is timely.

STATEMENT OF FEDERAL CLAIM

14. The Fifth Amendment to the United States Constitution is applicable to Defendant State by virtue of the Fourteenth Amendment and pursuant to these provisions the Defendant State is liable under federal law when it exercises its sovereign power to take or acquire private property for public use without affording the property owner a reasonable means of recovering full and just compensation for what was taken.

15. On January 31, 1991 a judgment was entered against the District in state court awarding VGV's assignor OSC just compensation after a unanimous jury had determined that the District had evicted OSC and taken public ownership of OSC's long term leasehold interest in the Ventura Harbor in breach of the implied covenant of good faith and fair dealing. On August 19, 1993 that judgment, in the sum of $15.6 million, together with interest from the day it was entered, became final when the California Supreme Court denied review of the published opinion of a unanimous panel of the California Court of Appeal in *Ocean Services Corp. v. Ventura Port District* 15 Cal.App. 4th 1762, 19 Cal.Rptr.2d 750 (Cal. Ct. App. 1993).

16. On August 20, 1993, VGV commenced an action in state court seeking to enforce that final judgment under *California Government Code* §§ 970 et seq. That same day the District filed for protection under Chapter 9 in federal Bankruptcy Court claiming, among other things, that it lacked the resources to pay the judgment because Article XIII A of the California Constitution ("Article XIII A") (adopted in

1978 by statewide initiative as Proposition 13) prohibited it from levying taxes to pay it unless two-thirds of the local property owners, residents, and taxpayers consented to being taxed for this purpose.

17. It being undisputed that the required percentage of local voters would not consent to taxation for this purpose, the Bankruptcy Court subsequently granted VGV relief from stay to permit VGV to secure a state court determination as to whether by adopting Article XIII A the People of California had intended to prohibit a local tax levy for this purpose in the absence of local voter approval. Thereafter, VGV's state court declaratory relief action, seeking a determination on this state law issue, was removed to the federal district court by the FDIC, one of the parties to VGV's state court action. And, on January 7, 1997, the District Court entered its judgment declaring that Article XIII A prohibited the District from levying any tax without the consent of the local electors to pay the judgment. VGV filed a timely appeal to the Ninth Circuit from that judgment.

18. While that appeal was pending, the Bankruptcy Court entered an order on September 20, 1998 approving the District's plan of debt adjustment. That order provided that the judgment against the District would be discharged upon payment of the sum of $7.7 million unless VGV established in its pending appeal before the Ninth Circuit that the District could levy local taxes or assessments to pay the full amount of compensation awarded VGV by the prior state judgment.

19. Before the Ninth Circuit, VGV's principal argument was that the statewide electorate by adopting Proposition 13 never intended its voter approval requirement to apply to taxes necessary to pay a judgment of this nature. At the time Proposition 13 was adopted, the California Supreme Court

had, for over 100 years, consistently adopted a narrow construction for the California Constitution's debt limit provision which, like Article XIII A, purported to require local electorate approval of any local public entity debt and liability in excess of annual revenues. In its debt limit cases the California Supreme Court and the lower state courts had repeatedly held that this constitutional provision was not intended to require local voter approval for the payment, satisfaction or performance of obligations "imposed by law" on a local entity. In urging the Ninth Circuit to reverse the District Court's contrary finding as to state law, VGV pointed out that since the issues were argued before the District Court, the California Supreme Court had again recently reaffirmed that state rule of narrow construction in *Rider v. City of San Diego*18 Cal.4th 1038, 1045; 959 P.2d 347, 353; 77 Cal.Rptr.3d 189, 195 (Cal. 1998) wherein it said "[w]e have long held that the debt limitation in section18 *only* applies to discretionary debt, not to obligations imposed by law." In support of its construction of Article XIII A, VGV also relied on the recent decision of a unanimous panel of the California Court of Appeal in *F&L Farm Company v. City Council of the City of Lindsay* 65 Cal.App.4th 1345, 77 Cal.Rptr.2d 360 (Cal. Ct. App. 1998) ("*F&L Farm*") (which was also decided after the issues of state law interpretation were argued before the District Court) wherein that state appellate court had, applying this long settled principle of state law constitutional construction, determined that Article XIII A did not repeal the pre-Proposition 13 statutes governing the levy of taxes to pay an inverse condemnation judgment.

20. On June 29, 1999 in a reported opinion styled *Ventura Group Ventures, Inc. v. Ventura Port District* 179 F.3d 840 (9th Cir. 1999) the Ninth Circuit concluded that VGV had raised important and unsettled issues of state law as

to the intended scope of Article XIII A. Issues which, if resolved in VGV's favor, would negate the need to address any of the questions VGV had raised as to the validity of Article XIII A under the United States Constitution. Based on these findings the Ninth Circuit certified the controlling state law questions regarding District's power and authority to levy local taxes or assessments, without voter approval, under state law, to the California Supreme Court for its determination.

21. Specifically, the Ninth Circuit noted that:

"[i]t is difficult to harmonize Article XIII A, California Harbors and Navigation Code § 6361, and §§California Government Code 970, 971. Therefore, Article XIII A may have repealed by implication any other duty on the part of the District or the County to levy property taxes to satisfy VGV's judgment. In the absence of any case law, we would enforce Article XIII A, the constitutional provision, to the exclusion of the statutory provisions. Nonetheless, we recognize that a California court has barred application of Article XIII A when an inverse condemnation judgment was at issue. See *F & L Farm Co. v. City Council*, 65 Cal.App.4th 1345, 77 Cal.Rptr. 2d 360 (1998). VGV argues that F & L Farm should be extended to bar the enforcement of Article XIII A in this case to permit the County to satisfy its judgment by levying additional property taxes.

Related to this argument, VGV argues that Article XVI's involuntary obligation exception, discussed in *F & L Farm*, should be applied in the Article XIII A context. See generally *County of Los Angeles v. Bryam*, 36 Cal.2d 694, 227 P.2d 4 (1951) (in bank); *Arthur v. City of Petaluma*, 175 Cal. 216, 165 P. 698

(1917); *Lewis v. Widber*, 99 Cal. 412, 33 P. 1128 (1893). At this time, the California courts have not extended the involuntary obligation exception of Article XVI in this manner. In addition, even if the exception were to apply in the Article XIII A context, VGV's judgment is a judgment for breach of the implied covenant of quiet enjoyment and the implied covenant of good faith and fair dealing and may not qualify as an "involuntary obligation."

22. After accepting these certified questions of state law for determination, the California Supreme Court, on February 15, 2001, provided its answers in a reported opinion styled *Ventura Group Ventures, Inc. v. Ventura Port District, et al.* 24 Cal.4th 1089 (Cal. 2001). Therein, it advised the Ninth Circuit that it did not need "to reach the state law question whether an exception for [involuntary] 'non-discretionary obligations' should be read into article XIII A." The basis for this holding was that the Defendant State's enforcement of judgment statutes, adopted by its Legislature prior to the adoption of Proposition 13, i.e., (*Cal. Rev. & Tax. Code*, §§2205, 2271 and *Cal. Gov. Code* §§970.8, 971), provided that local political subdivisions, like the District, could not levy additional taxes to pay any judgment arising from the exercise of its discretionary power to contract or the exercise of its discretionary power of eminent domain. Finding, as a matter of state law, that the judgment against the District arose from: (a) the District's discretionary decision to enter into a ground lease with OSC; and (b) the District's subsequent discretionary decision to acquire OSC's leasehold for public use by violating the implied covenant of good faith and fair dealing, the California Supreme Court concluded that, under state law, this was a judgment arising from a discretionary act for which the Legislature had determined a levy of additional taxes would not be allowed.

23. After reaching the conclusion that the state statutes allowed additional taxes for the payment of only those judgments that imposed unintended or unexpected involuntary obligations founded on principles of tort or inverse condemnation, the California Supreme Court, proceeded anyway to consider whether an exception from the "voter approval" requirement imposed by Article XIII A should be implied to permit its local political subdivision to pay judgments of this nature. As to this issue of state law the California Supreme Court expressly disapproved the *F&L Farm* Court's application of the longstanding and well established "involuntary obligation" exception applied in the debt limit clause to Article XIII A. In doing so, it held that the People of California when they adopted Proposition 13 had clearly and unequivocally intended to prohibit District, or any other local political subdivision in California, from levying local taxes or assessments to pay the full amount of compensation awarded to a private party by any state or federal court regardless of whether the obligation was voluntary or involuntary or arose from a discretionary or nondiscretionary act under prior state law.

24. The California Supreme Court also held that as far as Defendant State was concerned when local public entities within Defendant State suffered a money judgment, whether was voluntarily in nature, involuntarily imposed or arose from a discretionary or nondiscretionary act under state law, the local public entity could, "as the District did here," have that obligation discharged under Chapter 9 if it could not be paid unless local voters consented to pay additional taxes to satisfy it.

25. In its opinion, although it was not necessary for it to address any of the concerns VGV had raised under the United States Constitution since it had concluded the state statutes

and constitutional provisions were clear on their face, the California Supreme Court went on to consider and reject VGV's concerns under the United States Constitution. It held that VGV's suggestions that United States Constitution's Guarantee Clause or the Due Process Clause of its Fourteenth Amendment would be violated by any state law scheme that allowed local voters the power to decide whether final judgments against a local public entity would be paid in full or whether they would be subject to discharge under federal bankruptcy law both lacked merit. It also held that the *F&L Farm* Court's concern that a state law that allowed such to occur could result in a state sanctioned taking of private property without the payment of just compensation in violation of the Fifth Amendment's Taking Clause, opining that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment."

26. Upon receipt of the California Supreme Court's opinion, the Ninth Circuit ordered the parties to "submit simultaneous briefs of no more than twenty-five pages by April 30, 2001, apprising this Court on the effect of the California Supreme Court's opinion in *Ventura Group Ventures, Inc. v. Ventura Port District,* 24 Cal.4th 1089, 16 P.3d 717 (Cal. 2000) on the remaining issues in this appeal."

27. Since the Ninth Circuit had not certified and could not lawfully submit any question of federal law to the California Supreme Court for determination, VGV, in its Supplemental Brief, urged the Ninth Circuit to consider and independently determine whether the state statutes and state constitutional provisions, as construed and applied by the California Supreme Court, violated the United States Constitution's Guaranty and Due Process Clauses and to declare that these state laws, as construed by California's

highest court, were unconstitutional as applied to the judgment against VPD which it had jurisdiction to do in the context of the pending declaratory relief action.

28. VGV also urged the Ninth Circuit (although it lacked jurisdiction, to declare these laws unconstitutional and enjoin their enforcement based on the Taking Clause of the Fifth Amendment) to address the California Supreme Court's anticipatory and exculpatory suggestion that a future federal "taking" claim against the Defendant State would lack merit because the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment."

29. On August 29, 2001, the Ninth Circuit entered an unreported Memorandum Decision wherein it affirmed, based on the California Supreme Court's answers to its certified questions of state law, the declaratory judgment previously entered in District Court holding that state law prohibited a levy of taxes or assessments to pay the full amount of the compensation VGV had been awarded. In that opinion the Ninth Circuit expressly addressed and agreed with the California Supreme Court's holding that the state laws in question did not violate the Guaranty Clause and expressly held that VGV had waived its due process argument by failing to raise that issue in its opening brief before the Ninth Circuit. The Ninth Circuit, however, abstained from considering or addressing, in any fashion, the California Supreme Court's suggestion that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment."

30. On September 24, 2001 the Ninth Circuit denied VGV's Petition for Rehearing wherein VGV again suggested that although there was, as yet, no justiciable federal "taking"

claim against the State under the Fifth Amendment for the Ninth Circuit to consider, judicial resources would be conserved if it addressed the federal "taking" issues in the context of the present declaratory relief action rather than requiring that issue to be raised in a subsequent suit against Defendant State. The Ninth Circuit again declined to provide an advisory opinion on that issue.

31. On December 20, 2001 VGV filed its Petition for Writ of Certiorari with the United States Supreme Court seeking review of the Ninth Circuit's holding on the merits of the federal questions VGV raised under the United States Constitution's Guaranty Clause and the Due Process Clause of its Fourteenth Amendment. VGV therein also suggested that this case presented an exception to the rule of *Williamson County* and that either the Ninth Circuit or the United States Supreme Court did have Article III jurisdiction to address the merits of the California Supreme Court anticipatory, advisory suggestion that federal law would not require the Defendant State to pay VGV just compensation for the portion of the compensatory judgment against the District that was taken from it by operation of these state laws. VGV's Petition was denied by the United States Supreme Court on March 18, 2002.

32. By virtue of these prior proceedings it has been conclusively determined that the State of California has the governmental power to enact and enforce statewide laws that deny local governmental entities in California the power to levy taxes or assessments when necessary to pay the full amount awarded a private party as compensation for the deliberate or inadvertent taking of private property for public use unless two-thirds of the local voters/taxpayers vote to submit to taxation for this purpose.

33. As a direct and proximate result of the application of these state laws to payment of the judgment against the District which resulted in the discharge of the $15.6 million dollar, January 31, 1991, judgment against the District for a partial payment of $7.7 million dollars. Defendant State has deprived VGV of full and just compensation for the taking of its leasehold estate in the Ventura Harbor for the exclusive use and benefit of the public.

34. Although the People of California and its Legislature can constitutionally limit the power and ability of Defendant State's local political subdivision to pay just compensation when they take private property for public use, the Defendant State must pay "just compensation" under the Fifth Amendment where, as here, the exercise of that sovereign right, Defendant State forces a property owner to bear by itself alone a public burden, debt or obligation which, in all fairness and justice, should be borne by the public as a whole.

35. As a direct and proximate result of the application of these state laws to secure the discharge of the District's obligation under the judgment, VGV has been forced to bear alone a public obligation in excess of $20 million. A public obligation which the Fifth Amendment requires be borne by all the taxpayers in the Defendant State.

PRAYER FOR RELIEF

WHEREFORE, VGV prays that this Court assume jurisdiction over this dispute and consider the merits of VGV's claim that the operation of the state laws in question, as construed by the highest court of the State, have forced VGV alone to bear a public burden which, in all fairness and justice, should have been borne by the public as a whole, and

upon consideration of the merits that a judgment be entered in VGV's favor as follows:

A. For just compensation under the Fifth and Fourteenth Amendments to the United States Constitution in a sum according to proof at trial;

B. For the fees and expenses VGV has incurred in exhausting the state and federal remedies against the District which were necessary, under state law, before it could seek just compensation from the Defendant State;

C. For its attorney fees and costs of suit;

D. For interest, including prejudgment interest; and

E. For such further relief as the Court deems necessary and proper under the circumstances.

JURY DEMAND

VGV requests a jury trial on all questions of fact raised by its complaint.

DATED: November 14, 2002.

HEILY & BLASE
A Professional Law Corporation

By_____
JOHN R. JOHNSON
Attorneys for Plaintiff Ventura Group Ventures, Inc.

APPENDIX E

United States Court of Appeals
For the Ninth Circuit

Case No. 03-57004

[Filed September 27, 2005]

VENTURA GROUP VENTURES, INC., Plaintiff and Appellant;	) United States District Court, Central District of California Case No. CV-02 8785 HLH (Ex)
v.	
STATE OF CALIFORNIA, Defendant and Respondent.	

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

Appeal from the U.S. District Court for the
Central District of California
The Honorable Harry L. Hupp, Judge Presiding

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PETITION FOR REHEARING

TO THE CLERK, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Plaintiff and Appellant Ventura Group Ventures, Inc. ("VGV") petitions the Court for rehearing under *Federal Rules of Appellate Procedure* ("*FRAP*"), Rule 40 in the captioned matter with reference to the Memorandum Decision ("Decision") entered on September 16, 2005 and, in the alternative, suggests that this is an appropriate case for *en banc* consideration under *FRAP*, Rule 35.

STATEMENT OF COUNSEL & GROUNDS FOR REHEARING

In the judgment of counsel for VGV, a rehearing is warranted because *Azul-Pacifico, Inc. v. City of Los Angeles* 973 F.2d 704 (9th Cir. 1992) and *Golden Gate Hotel Ass'n v. City and County of San Francisco* 18 F.3d 1482 (9th Cir. 1994) ("*Golden Gate*") do not constitute binding Ninth Circuit precedent which the Court was bound to follow. Both cases are factually distinguishable from the case at bar in, at least, one very important respect. In each of these cases, the plaintiffs' claims were against local public agencies, *not* the state itself. In each case plaintiffs had a remedy under 42 *U.S.C.*§ 1983 to vindicate their constitutional claims but failed to utilize the federal statutory remedy Congress had provided for this purpose in 42 *U.S.C.*§ 1983. Accordingly, the *Azul-Pacifico* and *Golden Gate* courts concluded that, having failed to exhaust this statutory remedy, the plaintiffs could not invoke the District Court's federal question jurisdiction under 28 *U.S.C.*§ 1331 to consider a "taking" claim against these local entities directly under the Constitution itself.

On the other hand, as this Court correctly points out, binding precedent of the Supreme Court holds that a state is not a "person" subject to suit under 42 *U.S.C.*§ 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). ("*Michigan State Police*"). Therefore, unlike the plaintiffs in *Azul-Pacifico* and *Golden Gate*, VGV had no remedy to pursue under 42 *U.S.C.*§ 1983.

The issue presented in the case at bar is whether a person in VGV's position who could not, under controlling Supreme Court decisions, seek just compensation from the State of California via 42 *U.S.C.*§ 1983, has the right to invoke the District Court's jurisdiction under 28 *U.S.C.*§ 1331 to seek full just compensation from the State under the Fifth and Fourteenth Amendments based on *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897) ("*Chicago, Burlington*") and its progeny including *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172 (1985) ("*Williamson County*") and *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) ("*Suitum*"). Neither the *Azul-Pacifico* nor *Golden Gate* courts had any reason to consider this issue or to consider whether the principles articulated in *Chicago, Burlington*, *Williamson County* and *Suitum* precluded the State from defending such a suit on the basis of sovereign immunity since the Fourteenth Amendment, not Congress, has abrogated the States' sovereign immunity as to claims for an uncompensated taking of private property for public use.

For these reasons, VGV suggests this Court was not bound by the statements in *Azul-Pacifico* that "a litigant complaining of a violation of a constitutional right must utilize 42 *U.S.C.*§ 1983" (*Azul-Pacifico*, *supra* 973 F.2d at 905) and it was not bound by the statement in *Golden Gate* that "all claims of unjust taking ha[ve] to be brought pursuant to

Section 1983. . ." (*Golden Gate, supra,* 18 F.3d at 1486.) Those statements taken in context of the facts and issues presented in those cases can only be read to refer to suits against political subdivisions of a state which *are subject to suit* under 42 *U.S.C.*§ 1983.

Rehearing is also warranted because the Decision creates an apparent conflict with the prior decision of this Circuit in *Schneider v. County of San Diego* 285 F.3d 784, 793 -794 (2002) ("*Schneider*") where, in an opinion authored by Circuit Judge Tallman, it was observed that:

> "The Supreme Court has recognized that, unlike most constitutional provisions, the Fifth Amendment provides both the cause of action and the remedy for an unconstitutional taking, "frequently stat[ing] the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English,* 482 U.S. at 315-16, 107 S.Ct. 2378." (*Schneider, supra,* 285 F.3d at 793.)

The *Schneider* Court went on to conclude "because the just compensation remedy for a taking is constitutional in nature and thus a matter of judicial-- not legislative--function, the statutory vehicle for providing that remedy is not determinative of the remedy itself." (*Schneider, supra,* 285 F.3d at 794.) Thus, the failure of Congress to provide a statutory remedy against a state for an uncompensated taking under 42 *U.S.C.* § 1983 cannot be determinative of VGV's right to sue under the Fifth and Fourteenth Amendments precisely because the extent of that remedy is to be determined by the federal courts in the exercise of their 28 *U.S.C.*§ 1331 jurisdiction over claims arising under the Constitution. The Court's decision in the case at bar conflicts with the holding in *Schneider* which appears to require an

independent analysis of a litigant's rights under the Fifth and Fourteenth Amendments when Congress has provided an inadequate or non-existent *statutory* remedy to address an uncompensated taking of private property.

These points are all material to the decision in this case and are more fully discussed in the following Memorandum of Points and Authorities.

Should the Court disagree and conclude that *Azul-Pacifico* and *Golden Gate* represent controlling Circuit precedent from which this Panel cannot deviate, VGV suggests that this would be a proper case for a rehearing *en banc* to reconsider the holdings in *Azul-Pacifico* and *Golden Gate*. If they are binding authority in this Circuit, then the rule in this Circuit will be that no one has any federal remedy for an uncompensated taking of private property by a state under the Fifth and Fourteenth Amendments. That, as well as the companion issue as to whether sovereign immunity precludes the present claim against the State of California for an uncompensated taking, are important issues that warrant consideration by an *en banc* Court.

MEMORANDUM OF POINTS AND AUTHORITIES

1. *AZUL-PACIFICO* AND *GOLDEN GATE* DO NOT CONTROL THE OUTCOME OF THIS CASE.

It is well-established in this Circuit that when a three judge panel is presented with a case that is "factually indistinguishable" from a prior decision in this Circuit, the three-judge panel is bound by and may not overrule the prior three judge panel decision unless the prior decision has been "undercut by higher authority to such an extent that it has been effectively overruled by such higher authority and hence

is no longer binding on district judges and three-judge panels of this court." *Miller v. Gammie* 335 F.3d 889, 899 (9th Cir. 2002) ("*Gammie*"). The rule in this Circuit is that only an *en banc* panel may overrule a prior three judge panel decision that is "factually indistinguishable" from the pending case. *Gammie, supra,* 335 F.3d at 901-902 (O'scannlain J. concurring).

As already pointed out, the case at bar is clearly factually distinguishable from *Azul-Pacifico* and *Golden Gate* for one straightforward reason. Under *Michigan State Police*, VGV unlike the plaintiffs in *Azul-Pacifico* and *Golden Gate*, could not sue the defendant State under 42 *U.S.C.* § 1983. The fact that the plaintiffs in *Azul-Pacifico* and *Golden Gate* had a remedy under 42 *U.S.C.*§ 1983 was the crucial fact upon which the denial of relief via a direct action under the Fifth and Fourteenth Amendments was based. Specifically, in *Azul-Pacifico*, the plaintiff was denied relief because "Section 1983 was available to Azul, but plaintiff failed to file its complaint within the applicable limitations period." *Azul-Pacifico, supra,* 973 F.2d at 905.

The Ninth Circuit cases cited for this proposition by the *Azul-Pacifico Court*, i.e., *Bretz v. Kelman,* 722 F.2d 503 (9th Cir.1983), *vacated on other grounds,* 773 F.2d 1026 (1985) (*en banc*) and *Ward v. Caulk,* 650 F.2d 1144 (9th Cir.1981) denied the litigants direct relief under the Constitution for the same reason. As the *Ward* Court explained, "Ward has no cause of action on the federal constitution claims because the defendants he wishes to hold liable are all amenable to suit under 42 U.S.C. § 1983. That conclusion stands, notwithstanding the fact that Ward failed to avail himself of § 1983." *Ward v. Caulk, supra,* 650 F.2d at 1147.

This is the same rule the Supreme Court applies to taking claims against the federal government under the Fifth Amendment. "If the government has provided an adequate process [via the Tucker Act] for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government for a taking.'" (Bracketed material added.) *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172, 194-195 (1985). See, also, *Preseault v. I.C.C.* 494 U.S. 1, 2 (1990) (Even if an act of Congress gives rise to a "taking," there is no action directly under the Fifth Amendment because "compensation is available under the Tucker Act, and the requirements of the Fifth Amendment are therefore satisfied.")

But where, as here, there is no remedy afforded against a state under 42 *U.S.C.*§ 1983, the requirements of the Fifth Amendment, which are binding on the States via the Fourteenth Amendment, are clearly *not* satisfied, and a direct action must be allowed or the Fifth Amendment cannot be enforced against any state. This aspect of the Court's Decision should be reconsidered.

2. IF RECONSIDERATION IS NOT GRANTED, VGV'S SUGGESTION FOR A REHEARING *EN BANC* HAS MERIT.

If the holdings in *Azul-Pacifico* and *Golden Gate* can only be reconsidered by an *en banc* court, one should be convened for the reason stated above. If these cases truly stand for the proposition that the Fifth Amendment cannot be enforced against any state, this is an issue of exceptional importance that merits rehearing by an *en banc* court under *FRAP*, Rule 35.

CONCLUSION

If *Azul-Pacifico* and *Golden Gate* do not, upon reflection, represent binding Circuit precedent this Court must follow, the Decision should be withdrawn or vacated and upon rehearing the Court should consider the merits of the only claim VGV filed against the State of California, i.e., for payment of the full just compensation to which it is entitled under the Fifth and Fourteenth Amendments and whether sovereign immunity bars that claim. If the Court does not grant rehearing and continues to find that *Azul-Pacifico* and *Golden Gate* are binding Circuit precedent, VGV suggests that this is a text book case for a rehearing *en banc*.

DATE: September 27, 2005.

Respectfully submitted,
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By _____
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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 32(a)(7) (C)(i)

I certify that the attached brief uses proportionately spaced type, has a typeface of 14 points or more, and contains 2,488 words.

DATED: September 27, 2005.

HEILY & BLASE
A Professional Law Corporation

By _____
JOHN R. JOHNSON
Attorneys for Appellant
Ventura Group Ventures, Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I am employed in the City and County of Ventura, State of California. I am over the age of 18 years, not a party to the action herein, and my business address is 590 Poli Street, Ventura, California 93001-2633.

On September 28, 2005, I served the foregoing document described as **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*** on the interested parties to this action.

[X] **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon, fully prepaid, in the United States mail at Ventura, California;

[X] **BY OVERNIGHT DELIVERY**: I caused such envelope(s) to be delivered to the U.S. Court of Appeals for the Ninth Circuit by overnight, next business day delivery service.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on this 28th day of September, 2005.

_____
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APPENDIX F

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 03-57004

[Filed November 14, 2002]

VENTURA GROUP VENTURES, INC., a California corporation, Plaintiff-Appellant;	) Appeal No. 03-57004) United States District) Court, Central District
v.	) of California) Case No. CV-02-8785
STATE OF CALIFORNIA, Defendant-Appellee.	) HLH (Ex)))

APPELLANT'S OPENING BRIEF

Appeal from the U.S. District Court for the Central District of California

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JURISDICTIONAL STATEMENT

This action seeks just compensation from the State of California under the Fifth Amendment to the United States Constitution which became applicable to the States upon the ratification of its Fourteenth Amendment. The district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. (28 *U.S.C.* § 1331). The final judgment of the District Court, dismissing Plaintiff's complaint, was entered on October 25, 2003. (3 AER 1013-1015). 28 *U.S.C.* § 1291 gives this Court appellate jurisdiction over all final decisions of the District Court. Plaintiff's Notice of Appeal to this Court was timely filed on November 7, 2003. (4 AER 1017.)

STATEMENT OF THE CASE

This case involves a claim by Ventura Group Ventures, Inc. (hereinafter "Plaintiff" or "VGV") under the United States Supreme Court's seminal decision in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897) ("*Chicago, Burlington*"), which held that the Fourteenth Amendment requires the States to provide a reasonable statewide means to obtain just compensation for a taking of private property for public use. In 1993, VGV secured a final state court judgment against the Ventura Port District ("the District") (one of California's local public entities) awarding compensatory damages in excess of $15 million for the wrongful taking of VGV's predecessor's long term lease in the Ventura Harbor. (2 AER 0353-0365 and 0366-465.) Thereafter, a substantial portion of that judgment was discharged by the Bankruptcy Court for one and only one reason. (2 AER 0406-0462.) State statutes adopted by the California Legislature in 1974 and an amendment to the State Constitution adopted by the statewide electorate in 1978, were

construed by the California Supreme Court in 2001 to prohibit a levy of local taxes by California's local public entities to pay judgments which awarded persons just compensation for private property taken from them for public use. (2 AER 0216-0217; 3 AER 0406-0412.)

The District Court did not reach the merits of VGV's taking claim under *Chicago, Burlington* and its progeny. (4 AER 1014.) Relying on this Circuit's decisions in *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir.1992) ("*Azul-Pacifico II*") and *Bank of Lake Tahoe v. Bank of America*, 318 F.3d 914, 917 (9th Cir.1992) ("*Bank of Lake Tahoe*"), it held, instead, that the Fifth and Fourteenth Amendments to the United States Constitution cannot be enforced against a state by a private party in either state or federal court. (4 AER 1014-1015 and RT 1-26.)

THE ISSUES PRESENTED

1. Does a person, who has been denied payment of just compensation for property taken for public use by a state's exercise of its sovereign right to regulate the finances of its local political subdivisions, have a cause of action for money damages maintainable under the Fifth and Fourteenth Amendments directly against a state after that person has exhausted all other possible avenues of recovery against the assets and revenues of the state's local district?

2. Is the power of the Fourteenth Amendment sufficient to abrogate the state's sovereign immunity?

STATEMENT OF FACTS

VGV's predecessor, Ocean Services Corporation ("Ocean Services"), proceeded against the District under state law and

secured a judgment against the District awarding it "just compensation" in the sum of Fifteen Million, Five Hundred Sixty Thousand, One Hundred Sixty-Nine Dollars ($15,560,169 -- hereinafter "$15.6 million") for loss of project damages it sustained when the District evicted it and took Ocean Services' long term Harbor Village lease in breach of the implied covenants of quiet enjoyment and good faith and fair dealing. (2 AER 0399-0405.) That judgment became final for purposes of state law on August 19, 1993. (2 AER 0365.)

On August 20, 1993, the District filed a case under Chapter 9 of the Bankruptcy Code. (1 AER 0183.) On September 20, 1998, the Bankruptcy Court approved a plan of debt adjustment pursuant to which the judgment would be discharged upon the payment of Seven Million, Seven Hundred Thirty-Nine Thousand, Eight Hundred Twenty-One Dollars ($7,739,821 -- hereinafter "$7.7 million") if state law prohibited the District from levying local taxes or assessments to pay the balance it owed on the judgment. (1 AER 0216-0217; 2 AER 0406-0412.)

The availability of local taxes to pay the judgment was at that point already before the Ninth Circuit on an appeal from a prior District Court judgment holding that local taxes could not be levied for this purpose. (Ibid.) On June 29, 1999, in a reported opinion styled *Ventura Group Ventures, Inc. v. Ventura Port District* 179 F.3d 840 (9th Cir.1999), the Ninth Circuit certified the question of state law to the Supreme Court of California. (2 AER 0277-0282.)

On February 15, 2001, the California Supreme Court, in a reported opinion styled *Ventura Group Ventures, Inc. v. Ventura Port District, et al.* 24 Cal.4th 1089 (Cal. 2001), held that local taxes could not be levied to pay the judgment

because state statutes adopted in 1974 (*Cal. Rev. & Tax. Code* §§2205, 2271 and *Cal. Gov. Code* §§970.8, 971) flatly prohibited local political subdivisions, like the District, from levying additional taxes to pay judgments arising from the exercise of its discretionary power to contract or the exercise of its discretionary power of eminent domain. (2 AER 0489-0500.) As the California Supreme Court explained, under state law the judgment against the District arose from: (a) the District's discretionary decision to enter into a ground lease with Ocean Services; and (b) the District's subsequent discretionary decision to acquire Ocean Services' leasehold for public use by violating the implied covenant of good faith and fair dealing. (2 AER 0495.)

After deciding VGV's case on this narrow state statutory ground, the California Supreme Court went on to hold that the People of California, by adopting Proposition 13 in 1978, had made it equally clear that neither the District, nor any other local political subdivision in California, could levy local taxes to pay the full amount of just compensation awarded to private parties after their property was taken for public use. (2AER 496-0498.)

Upon receipt of the California Supreme Court's opinion, the Ninth Circuit ordered the parties to "submit simultaneous briefs of no more than twenty-five pages by April 30, 2001, apprising this Court on the effect of the California Supreme Court's opinion in *Ventura Group Ventures, Inc. v. Ventura Port District*, 24 Cal.4th 1089, 16 P.3d 717 (Cal. 2000), on the remaining issues in this appeal."

In its Supplemental Brief, VGV acknowledged that it has long been settled that the United States Supreme Court "will not review a State court decision resting on an adequate and independent non-federal ground even though the State court

may have also summoned to its support an erroneous view of federal law" (*Radio Station WOW v. Johnson*, 326 U.S. 120, 129; 65 S.Ct. 1475, 1480; 89 L.Ed. 2092), but suggested the Ninth Circuit was not "sitting as an appellate court *vis a vis* the California Supreme Court" and that its decision should correctly reflect its "view of federal law wherever it differs from the views expressed in the California Supreme Court's opinion." (4AER 0866-0869.)

In its Supplemental Brief, VGV urged the Ninth Circuit to consider and independently determine whether the state statutes and state constitutional provisions, as construed and applied by the California Supreme Court, violated the United States Constitution's Guaranty and Due Process Clauses. (4 AER 0876-0877.) VGV also requested that the Ninth Circuit address and correct the California Supreme Court's erroneous and volunteered statement that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment." (4 AER 0878-0879.)

On August 29, 2001, the Ninth Circuit entered an unreported Memorandum Decision wherein it affirmed, based on the California Supreme Court's answers to its certified questions of state law, the declaratory judgment previously entered in District Court holding that state law prohibited a levy of taxes or assessments to pay the full amount of the compensation VGV had been awarded. (4 AER 0919-0921.) In that opinion, the Ninth Circuit expressly addressed and agreed with the California Supreme Court's holding that the state laws in question did not violate the Guaranty Clause. (4AER 0921.) It further held that VGV had waived its Due Process Clause argument by failing to raise that issue in its opening brief before the Ninth Circuit. (Ibid.) The Ninth Circuit, however, abstained from considering or addressing,

in any fashion, VGV's potential claim against the State under the Just Compensation Clause and the California Supreme Court's suggestion that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment." (Ibid.)

In its Petition for Rehearing before the Ninth Circuit, VGV again suggested that although there was, as yet, no justiciable federal "taking" claim against the State under the Fifth Amendment for the Ninth Circuit to consider, judicial resources would be conserved if it addressed the federal "taking" issues in the context of the present declaratory relief action rather than requiring that issue to be raised in a subsequent suit against Defendant State. (4AER 0927-0940.)

The Ninth Circuit again declined to provide an advisory opinion on that issue. (4 AER 0945.)

On December 20, 2001, VGV filed its Petition for Writ of Certiorari with the United States Supreme Court seeking review of the Ninth Circuit's holding on the merits of the outcome determinative issues VGV raised under Guaranty Clause and the Due Process Clause. (4 AER 0946-0983.) VGV therein also suggested that this case presented an exception to the rule of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172, 190, 194 (1985) ("*Williamson County*") and that either the Ninth Circuit or the United States Supreme Court had Article III jurisdiction to address the merits of the California Supreme Court's suggestion that federal law would not require the Defendant State to pay VGV just compensation for the portion of the compensatory judgment against the District that was taken from it by operation of these state laws. (4AER 0968-0973.)

On March 18, 2002, the United States Supreme Court denied VGV's Petition for Writ of Certiorari without comment. (4 AER 0991.) The present action was filed on November 15, 2002 within one year thereafter. (1AER 0001-0015.)

In the present action, VGV is seeking to impose liability on the State because "[a]s a direct and proximate result of the application of these state laws to secure the discharge of the District's obligation under the judgment, VGV has been forced [by the State] to bear alone a public obligation in excess of $20 million.[1] A public obligation which VGV contends the Fifth Amendment requires be borne by all the taxpayers in the Defendant State." (VGV Complaint, paragraph 35, 1AER 0014.)

The District Court found that current Ninth Circuit decisions precluded it from granting that relief. Specifically, it held:

> "The present state of Ninth Circuit law has a two-fold application. It is clearly held by the most recent Ninth Circuit authority that a takings claim must be presented through an action brought pursuant to 42 USC § 1983. (Azul-Pacifico v. City of Los Angeles 9Cir'92 973 F2d 704) (Azul II).) . . . Accordingly, this court must treat plaintiff's complaint as one under § 1983. However, there is a "Catch 22." The State may not be sued under § 1983 because it is not a "person" within the meaning of § 1983. This was true

---

[1] The $7.7 million paid in October 1998 did not even cover the interest that had accrued on the $15.6 million judgment since it was entered on January 31, 1991.

even before Seminole Tribe of Indians '96 517 US 44, 134 LEd2d 252. (Quern v. Jordan '79 440 US 332, 59LEd2d 358; Will v. Michigan '89 491 US 58, 105 LEd2d 45). It is even more true now that Congress may not "waive" the state's sovereign immunity for federally created claims. (Seminole Tribe, supra; Mitchell 9Cir'00 209 F3d 1111.) Left to its own devices, the court would not reach this conclusion. This suit is brought under the Fifth Amendment, which is binding on the states through the Fourteenth Amendment. (Chicago B & O R Co. 1897 166 US 226, 41 Led 979; Webb's Fabulous Pharmacies, Inc. '80 449 US 155, 66 LE2d 35.8) The power of the Fourteenth Amendment should be sufficient to abrogate the state's sovereign immunity, and the procedural neatness of requiring such actions to be brought under § 1983 should not apply to something as fundamental as the takings clause of the Fifth Amendment. However, the present state of the law in the Ninth Circuit is that takings cases must be brought § 1983, and the state may not be sued under § 1983. Seminole Tribe has wiped out a lot of potential claims against the state (i.e., copyright, patent, and trademark), and this appears to be another such situation.

STANDARD OF REVIEW

The existence of sovereign immunity is a question of law reviewed de novo. *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir.2003). The district court's grant of summary judgment is reviewed de novo. *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 461 (9th Cir.1999) (*"Parsons Co."*). That standard requires the appellate court to review the evidence in the light most favorable to the non-moving party

and determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See *Fed R. Civ. P.* 56©; *Parsons Co., supra,* 195 F.3d at 461. An appellate court may affirm a grant of summary judgment on any ground supported by the record, even if not relied upon by the district court. *Simo v. Union of Needletrades*, 322 F.3d 602, 610 (9th Cir.2003). Where the district court did not have occasion to address the alternative ground, it may also reverse and remand for the district court to examine the merits of those arguments in the first instance. *Gilbertson v. Albright,* 350 F.3d 1030 (9th Cir.2003).

ARGUMENT

1. INTRODUCTION.

The District Court's decision has, perhaps inadvertently, promoted the match of the century pitting two previously unbeaten titans in a fight to the death against each other. In the black corner, wearing black trunks and a black hat, is *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) ("*Hans v. Louisiana*"), the champion of a state's right to say when and if it will provide a private party compensatory damages for a wrong it has committed. In the white corner, wearing white trunks and a white hat, is *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897) ("*Chicago, Burlington*"), the champion of an individual's right to just compensation when private property is taken for public use. They have never been matched against each other before.

Both have an unblemished record of victories. But, all of *Hans v. Louisiana's* more recent victories have been by slim 5-4 split decisions, whereas *Chicago, Burlington's* victories have been, for the most part, unanimous 9-0 decisions. There is also a chance that the match may be called off because one of the more vocal of *Hans v. Louisiana's* supporters, i.e. the State of California, is insisting that its own judges have already determined that there was no taking of private property for which compensation would be owed, and is insisting that *Chicago, Burlington* is disqualified by the *Rooker-Feldman* rule from challenging *Hans v. Louisiana* in the federal arena.

What hangs in the balance is of critical importance. If *Hans v. Louisiana* prevails, the "just compensation" mandated by the Fifth Amendment can no longer be enforced via the Fourteenth Amendment against a state and *Chicago, Burlington* will no longer be able to afford compensation to individuals whose property has been taken for public use.

2. FEDERAL "TAKING" JURISPRUDENCE, AS IT HAS EVOLVED UNDER *CHICAGO BURLINGTON*, PRESUPPOSES THAT THE STATES ARE SUBJECT TO SUIT IN FEDERAL COURTS IF STATE LAW DOES NOT AFFORD A JUST COMPENSATION REMEDY. THERE IS NO SOVEREIGN IMMUNITY DEFENSE TO SUCH A CLAIM.

In 1897, the *Chicago, Burlington* Court held that the Fifth Amendment's requirement of just compensation was binding on the States by virtue of the Fourteenth Amendment. But, since the Fifth Amendment's does not prohibit the taking of private property for public use, the rule has evolved that federal judiciary simply cannot restrain the taking of private

property for public use by either the state or federal government. *Williamson County Regional Plann'ng Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172, 190, 194 (1985). There is but one way that the mandatory requirement of "just compensation" can be enforced. That is by an award of money damages against an offending state.

The sovereign right of each State to define for itself whether it will submit to private suits for money damages established in *Hans v. Louisiana*, which is the fountainhead for each of the cases cited by the District Court, cannot be applied to defeat a claim *against a state* for just compensation under the Fifth Amendment, if only because to do so would render the Fifth Amendment unenforceable against the States. If the remedy of "just compensation" for property taken for public use cannot be enforced by the federal judiciary, then whether just compensation will be allowed or not is entirely optional at the sole discretion of each sovereign state's lawmakers. Not a single case cited by the District Court supports such a drastic and draconian result.

While it may well be, that looking at the original Constitution only, as the *Hans v. Louisiana* Court did, one could concluded that the States would be immune from damage claims for compensation by persons whose private property had been taken for public use, no one can make that suggestion after the Fourteenth Amendment was adopted. As *Chicago, Burlington* made clear, the Fourteenth Amendment guarantees that where private property has been taken for public use the federal courts are required to provide a just compensation remedy *if state law did not*.

3. THE JUDICIARY'S AUTHORITY TO ENFORCE THE FIFTH AMENDMENT COMES FROM THE

CONSTITUTION AND 28 U.S.C. 1331, NOT FROM 42 U.S.C. 1983.

This Circuit did not hold in *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir.1992) ("*Azul-Pacifico II*"), that a takings claim *against* a state "must be presented through an action brought pursuant to 42 USC § 1983." (Emphasis in the original.) The defendant in that case was the City of Los Angeles. The United States Supreme Court has repeatedly held that local public entities of a state (like the City of Los Angeles) were "persons" Congress intended to subject to claims for money under 42 *U.S.C.* § 1983. What the Court said in *Azul-Pacifico II* was that since Congress had provided Azul-Pacifico a *reasonable* money damage remedy to secure just compensation from the City of Los Angeles under 42 *U.S.C.* § 1983, Azul-Pacifico was required to pursue that *statutory* remedy within the time allowed by law, precisely what *Williamson County* required Azul-Pacifico to do. The *Azul-Pacifico II* Court had no occasion to consider or discuss the effect, if any, of 42 *U.S.C.* § 1983 to a just compensation claim against a state which could not be sued for just compensation under 42 U.S.C. § 1983.

History is once again clear. While a state's local political subdivisions are "persons" for purposes of a money damage award under 42 *U.S.C.* § 1983, the United States Supreme Court has repeatedly held that the States are not. As to the States the High Court concluded that Congress had not used sufficiently precise language in 42 *U.S.C.* § 1983 to support a finding that it had intended to "abrogate" the States' *Hans v. Louisiana* sovereign immunity from suit for money damages. For this reason and this reason alone, the United States Supreme Court has made it clear that an injured party cannot use 42 *U.S.C.* § 1983 as the vehicle to secure a money

judgment against a state like California. (See, e.g., *Quern v. Jordan* 440 U.S. 332, 59 L.Ed.2d 358 (1979) and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("*Michigan State Police*").

But, to reason as the District Court did, that without a remedy under 42 *U.S.C.* § 1983, VGV cannot state a claim for "just compensation" against the State under the Constitution itself begs the question. Congress does not have the power to amend the Constitution or overrule the *Chicago, Burlington* Court's determination that the Fifth Amendment's just compensation remedy was directly enforceable against the States under the Fourteenth Amendment. Ironically, the line of cases relied on by the District Court makes it perfectly clear that Congress does not have the power (by failing to clearly articulate its intent to abrogate the States sovereign immunity) to render the Fifth Amendment unenforceable against the States. For example, in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) ("*Kimel*") one of the more recent decisions on the subject of sovereign immunity the majority said:

> "Congress cannot decree the substance of the Fourteenth Amendment's restrictions on the States . . . It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. (authority omitted). The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch. (Authority omitted)." (Emphasis added.) *Kimel, supra*, 528 U.S. 62 at 80.

The United States Supreme Court has long held that "[t]he Constitution has declared that just compensation *shall* be paid." *Monongahela Navigation Co. v. United States*, 148

U.S. 312, 327; 13 S.Ct. 622, 626; 37 L.Ed. 463 (1893). (Emphasis added.) And, that the Constitution itself provides both the [just compensation] cause of action and the remedy. *Jacobs v. United States*, 290 U.S. 13, 16, 54 S.Ct. 26, 27, 78 L.Ed. 142 (1933). The Judicial Branch is the branch charged with the enforcement of that cause of action and remedy. The District Court had jurisdiction over this federal question dispute arising under the Constitution under 28 U.S.C. § 1331, and it erred in dismissing VGV's case on the ground that 42 *U.S.C.* § 1983 was VGV's exclusive remedy.

The Ninth Circuit's *Bank of Lake Tahoe* decision is also of no assistance in the case at bar. Although a state was sued in that case, there was no Fifth Amendment claim put forward against it. The only federal claim advanced there was against state regulators under the Equal Protection clause and the only relief sought was an injunction. In *Exparte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court had held that states and state officials, acting in their official capacities, are "persons" subject to suit in federal court under 42 *U.S.C.* § 1983 if a person is seeking non-monetary prospective relief rather than damages payable from the state treasury. *Michigan State Police* did not change this rule. After *Michigan State Police* was decided, states continued to be "persons" under § 1983 for purposes of this type of action. The Supreme Court still considers the most important application of *Exparte Young* "to be where there is no state forum available to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 271, 117 S.Ct. 2028 (1997).

Bank of Lake Tahoe did not confront any issue of sovereign immunity. It simply dismissed the plaintiffs' request

for an injunction against state regulators under 42 *U.S.C.* §1983 because it had no factual support. The Ninth Circuit, observing that to secure such relief a plaintiff must "demonstrate a reasonable likelihood of future injury," affirmed the dismissal of that cause of action because "[n]othing has been alleged from which we can conclude that either Bourdeau or BLT face a likely threat of future injury." *Bank of Lake Tahoe, supra,* 318 F.3d at 918.

Cases like *Bank of Lake Tahoe* brought against a state in federal court under *Exparte Young* do, however, make it perfectly clear why a private party has a federal cause of action for damages against a state under the Just Compensation Clause. *Chicago, Burlington* and its progeny, and in particular *Williamson County*, make it perfectly clear that an injunction cannot be issued to prohibit a taking of private property by a state or one of its local entities. Since prospective relief under *Exparte Young* is not available in such situations, the only means available to enforce Just Compensation Clause is an action to collect money damages. It has been unquestioned since *Chicago, Burlington* was decided that if a state does not provide a reasonable means to secure just compensation after the property is taken, the federal courts will. That is still the rule in this Circuit.

Anticipating that the State will urge this Court to affirm the judgment on alternative grounds, VGV will address the State's claim that federal bankruptcy law, rather than state law, took the "just compensation" VGV had been awarded against the District. It will also address the State's failure to exhaust state remedies and *Rooker Feldman* defenses, at this time. These issues are all tied in one fashion or another to the California Supreme Court's unsolicited *sua sponte* comment that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in

violation of the Fifth Amendment." If the State, in its Respondent's Brief, suggests other alternative grounds that may require the Court to affirm the judgment, VGV will address them in its Reply Brief.

4. THE CHAPTER 9 DISCHARGE OF THE JUDGMENT AGAINST THE DISTRICT DID NOT TAKE ANY PROPERTY FROM VGV.

California Supreme Court's comment that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment" is ambiguous in the context it was made. The prior action against the District involved California's sovereign right to control the finances of its local political subdivisions. Had state law not prohibited a levy of local taxes to pay the judgment against the District, VGV would have recovered the full amount of just compensation it had been awarded against the District.[2] But once the People of California, its Legislature, or its highest court determined that state law prohibited a levy of local taxes to pay the balance owed on the judgment against the District, the Bankruptcy Court's hands were tied. (Compare, *United States v. Bekins*, 304 U.S. 27, 33; 58 S.Ct. 811, 812; 82 L.Ed. 1137 (1938) with *Ashton v. Cameron County District*, 298 U.S. 513; 56

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[2] If the District had the power to tax, governing federal law would have required the Bankruptcy Court to dismiss the District's Chapter 9 case if the District refused to exercise that power. See, e.g., *Lorber et al. v. Vista Irr. Dist.*, 127 F.2d 628, 638 (9th Cir. 1942). Upon dismissal of the Chapter 9 case, California law clearly required its courts to issue a writ of mandate to require the District to levy taxes to pay the judgment. See, e.g., *May v. Board of Directors* 34 Cal.2d 125, 208 P.2d 661 (Cal. 1949).

S.Ct. 892; 80 L.Ed. 1309 (1936). The Bankruptcy Court had to discharge the balance owed on the judgment provided the District's plan provided VGV with an amount that it could reasonably expect to recover were it to enforce the judgment under state law.

As far as federal law was concerned, the case against the District established nothing more than a state's sovereign power to prohibit, or make optional, the payment of just compensation by its local public entities. In that case, the federal courts did not and could not consider or address the consequences to the State itself under the Fifth Amendment when it exercised its power to control local districts in this fashion. As discussed more fully in the next section, the fact that this was not an issue that could be resolved in the prior case against the District is precisely why *Rooker-Feldman* does not preclude it from being considered now.

Under *Chicago, Burlington* the State had the obligation to provide a reasonable statewide means for persons to obtain just compensation for a taking of private property for public use by any one of its many separate local entities. The facts bearing on this issue are not disputed. The California Supreme Court's own decision shows that California failed to provide what the Constitution required. It holds that state law gave the District discretion to deliberately breach the implied covenant of good faith in order to acquire OSC's property. It also held that state law (*Cal. Rev. & Tax. Code* §§ 2205 and 2271) flatly prohibited a levy of local taxes to pay for what was taken.

There is also no dispute as to the controlling federal law. As Justice Scalia put it in his concurring opinion in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 748, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997):

> ". . . once there is a taking, the Constitution requires just (i.e., full) compensation, see, e.g., United States v. 564.54 Acres of Monroe and Pike County Land, 441 U.S. 506, 510, 99 S.Ct. 1854, 1856, 60 L.Ed.2d 435 (1979) (owner must be put 'in as good a position pecuniarily as if his property had not been taken'); Monongahela Nav. Co. v. United States, 148 U.S. 312, 326, 13 S.Ct. 622, 626, 37 L.Ed. 463 (1893) ("[T]he compensation must be a full and perfect equivalent for the property taken") . . ."

A remedy that allows recover in 1998 of only $7.7 million dollars for a judgment awarding VGV just compensation of $15.6 million dollars in 1991 for property the District had taken for public use in 1987 is patently unreasonable under this standard.

5. VGV HAS EXHAUSTED ALL STATE REMEDIES AGAINST THE DISTRICT AND IT IS CLEAR THAT VGV HAS NO REMEDY AGAINST THE STATE UNDER STATE LAW.

Federal taking jurisprudence articulated by the United States Supreme Court over the past 100 years from *Chicago, Burlington* to *Williamson County* to *Suitum* does not ignore the States' status as sovereigns. To the contrary, out of respect for it, a stern, unbending and iron clad principal of federal taking jurisprudence has evolved. No federal court has jurisdiction to consider a "taking" claim under the Fifth Amendment against a state unless the plaintiff has first exhausted the remedies available to secure just compensation under state law and the plaintiff has come away with less than the "just compensation" mandated by the Fifth Amendment or can establish that the state remedy will not result in full compensation. *Suitum, supra,* 520 U.S. at 738.

VGV has satisfied the required conditions precedent to the filing of this action. It has exhausted all means of securing just compensation from the District. The Bankruptcy Court's order determined the amount of just compensation VGV would be denied if state law prohibited a levy of local taxes to pay the judgment. Upon the United States Supreme Court's denial of VGV's petition challenging the enforceability of a state law that makes the payment of just compensation optional at the behest of local taxpayers on March 18, 2002, the amount of VGV's damage became fixed, definite and certain. Only then did VGV cause of action against the State accrue. This action was filed on November 15, 2002 well before the one year had passed.

Since the California Supreme Court by its response to the Ninth Circuit's certified question of state law has unquestionably committed the courts of California to deny VGV any relief against the State under state law, VGV was not required to seek relief against the State in state court under state law. Where, as here, the State's highest court has already said "that there was no Fifth Amendment violation" the federal courts have jurisdiction to hear the Plaintiff's claims under the Fifth Amendment. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 851 (9th Cir.2001) (en banc) affirmed *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003).

6. *ROOKER-FELDMAN* DOES NOT APPLY.

The limitation placed on the District Court's jurisdiction by the *Rooker-Feldman* doctrine is not of a Constitutional origin. Rather, it arises out of a pair of negative inferences drawn from 28 *U.S.C.* § 1331 (which establishes the District Court's original jurisdiction in civil actions arising under the

Constitution, laws and treaties of the United States) and 28 *U.S.C.* § 1257 (which gives the United States Supreme Court exclusive jurisdiction to review final judgments or decrees rendered by the highest court of a State). *In re Gruntz v. County of Los Angeles*, 302 F.3d 1074, 1078 (9th Cir. 2000) (en banc) ("*Gruntz*"). The doctrine takes its name from two cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) ("*Rooker*") and *Feldman*, 460 U.S. 462 (1983), discussed above.

Rooker held that the district courts lacked jurisdiction to hear a case that turned on an issue of federal law that had been raised in a prior state court action if the state courts' ruling on federal law could have been reviewed by the United States Supreme Court under its appellate jurisdiction on a writ of certiorari in the prior case. (*Rooker, supra*, 263 U.S. at 415-416.) *Rooker* prevents a disgruntled litigant from foregoing certiorari review and then filing a subsequent action in district court challenging the state court's holding based on federal law. *Bianchi v. Rylaarsdam*, 334 F.3d 895 (9th Cir. 2003), upon which the State relied in the district court is a classic illustration of the type of suit prohibited by the *Rooker* branch of the doctrine.

Feldman held that *Rooker's* jurisdictional bar also prohibits a litigant from presenting his federal claims piecemeal before a different courts. Under this branch of the doctrine the district courts are prohibited from hearing a constitutional challenge to a state statute, that should have been, but was not, raised in the prior state or federal court action (*Feldman, supra*, 460 U.S. at 486-487) *with one very important caveat, to wit:* by definition, the doctrine cannot apply to a constitutional issue purportedly determined in the prior case if the United States Supreme Court lacked jurisdiction to review and correct that holding in the exercise

of its exclusive appellate jurisdiction under 28 *U.S.C.* § 1257 over the prior case.

If the California Supreme Court's purported holding that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment" was not subject to review and correction by the United States Supreme Court in the prior case against the District, *Rooker-Feldman* cannot possibly preclude either the District Court or this Court from reexamining this statement if necessary in the case at bar.

There was no issue in the case against the District as to whether a bankruptcy discharge could be construed as a taking in violation of the Fifth Amendment. The only relevance the Fifth Amendment had to the prior case was with reference to whether it would be appropriate to adopt a narrow construction of state law to avoid a construction of state law that could result in a taking. In that regard, *England v. Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 419-421 (1964) ("*England*") requires a litigant to disclose to the state court any constitutional concerns that would arise if a certain construction were adopted even though the litigant reserves the right to return to federal court for a final decision on the federal issues.

Once the Ninth Circuit certified the questions regarding the proper construction of the California taxing provisions to the California Supreme Court, *England* required VGV to make known to the California Supreme Court any potential concerns that might arise under the United States Constitution so that the California Supreme Court would have the benefit of those arguments in deciding whether it would be appropriate to adopt a narrow construction of the law to avoid those constitutional concerns.

As the United States Supreme Court later made clear in *Feldman* severe consequences follow from a litigant's failure to make the disclosure mandated by *England*. "[B]y failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court." *Feldman, supra,* 460 U.S. at 483.

VGV's briefs before the California Supreme Court demonstrate that VGV complied with *England* and *Feldman*. After devoting sixteen pages to a discussion of the proper construction of Article XIII A under state law, VGV devoted the next eight pages to the "constitutional concerns [that] would arise if proposition 13 was construed to have repealed state law governing the payment of judgments by local government." (Bracketed material added for clarity.)

Had VGV not briefed these issues before the California Supreme Court, it would have forfeited its right to raise the Guaranty Clause and Due Process Clause issues before the Ninth Circuit once the case returned there as well as its right to raise these outcome determinative issues on a Petition for Writ of Certiorari to the United States Supreme Court. Similarly, had VGV not briefed the Taking and Just Compensation concern, it may have forfeited its right to bring a just compensation claim against the State after the decision in favor of the District on the taxing issues became final on March 18, 2002 when the United States Supreme Court denied VGV's Petition for Writ of Certiorari.

Neither VGV nor the Ninth Circuit requested an advisory opinion from the California Supreme Court as to whether an action could be maintained against the State under the Fifth Amendment if state law prohibited a levy of local taxes to pay the just compensation awarded against the District. *Rooker-*

Feldman does not deprive this Court or the District Court of jurisdiction because the United States Supreme Court itself lacked appellate jurisdiction under 28 *U.S.C.* § 1257 to review, much less, correct the California Supreme Court's self serving *sua sponte* comment.

A few examples should suffice to make this point. In *Agins v. City of Tiburon* 24 Cal.3d 266, 273-274, 598 P.2d 25, 29, 157 Cal.Rptr. 372, 376 (Cal. 1979.) ("*Agins*"), the California Supreme Court offered a similar observation as to the scope of the Fifth Amendment when it held that the Fifth Amendment did not require payment of "just compensation" in cases that involved a temporary regulatory taking. The United States Supreme Court granted certiorari and upon review concluded that there was no taking at all under the Fifth Amendment and affirmed the California Supreme Court's decision, without commenting on the California Supreme Court's statement that the Fifth Amendment did not require just compensation for a temporary, regulatory taking. (See *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).)

Thereafter, it was requested on several occasions in other cases to consider the question but again declined to do so because consideration of that issue was not outcome determinative. See, e.g., *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*. 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); and *San Diego Gas & Electric Co.*, 450 U.S. 621, 631-632, 101 S.Ct. 1287, 1293-1294 (1981). It was not presented with an Article III case or controversy it had jurisdiction to consider, i.e., a case where that issue was outcome determinative until 1987. In *First English Evangelical Lutheran Church of Glendale v. County of Los*

Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) ("*First English*"), the Supreme Court found "the constitutional claim properly presented in this case." It held that "the California courts have [since *Agins*] decided the [temporary taking] compensation question in consistently with the requirements of the Fifth Amendment." *First English, supra*, 482 U.S. at 310-311. (Bracketed material added.)

The case at bar is the first case where the California Supreme Court's statement may be outcome determinative. The first time this question will be ripe for review by the Supreme Court, under its 28 *U.S.C.* § 1257 appellate jurisdiction, will be after the District Court has exercised its original jurisdiction under 28 *U.S.C.* § 1331 to decide it.

The inapplicability of *Rooker-Feldman* to a federal Fifth Amendment claim against a state, based on a determination of state law by its highest court, is well-illustrated by the flurry of federal litigation arising out of the Hawaii Supreme Court's decision in *McBryde Sugar Co. v. Hawaii*, 54 Haw. 174, 504 P.2d 1330 (1973) ("*McBryde Sugar*"). In *McBryde Sugar*, the Supreme Court of Hawaii turned state water rights law on its head by declaring, *sua sponte*, that the state of Hawaii owned all the water in the Hanapepe River and adopting the common law doctrine of riparian rights as the law of Hawaii.

Faced with the potential loss of water rights by this unexpected pronouncement, the plaintiffs moved for rehearing in the Hawaii Supreme Court contending the decision had taken their vested water rights without compensation in violation of the Fifth Amendment. The Hawaii Supreme Court denied rehearing without addressing that federal claim. The United States Supreme Court subsequently denied three separate petitions seeking review of that decision on Fifth

Amendment grounds.[3] The Robinsons then filed suit in federal district court seeking an injunction prohibiting the enforcement of the state court *McBryde Sugar* decision on the grounds that it violated the Fifth Amendment. The district court agreed and issued an injunction prohibiting the State from enforcing that decision.

On appeal, Hawaii suggested that since the United States Supreme Court had denied certiorari to review the *McBryde Sugar* case, the *Rooker-Feldman* doctrine deprived the district court of subject matter jurisdiction to consider the Fifth Amendment taking issue. The Ninth Circuit, finding the doctrine applied, then created an exception to it based on the Hawaii Supreme Court's refusal to consider the Fifth Amendment issue. *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985) ("*Robinson I*").

The United States Supreme Court granted Hawaii's petition for certiorari in *Robinson I* and (without briefing or oral argument) summarily vacated the Ninth Circuit's decision and remanded the case to the Ninth Circuit for further consideration in light of its landmark jurisdictional decision in *Williamson County*. See *Ariyoshi v. Robinson*, 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed.2d 560. By doing this, the United States Supreme Court made it unmistakably clear that the *Rooker-Feldman* doctrine would not bar a subsequent Fifth Amendment suit against a state in district court after the state's highest court had rendered a decision that could at some point result in the taking of private property for public

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[3] See *McBryde Sugar Co. v. Hawaii*, 417 U.S. 962, 94 S.Ct. 3164, 41 L.Ed.2d 1135 (1974); *Robinson v. Hawaii*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974); and *Albarado v. Hawaii*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974).

use without just compensation. On remand, the Ninth Circuit concluded that an action against the state was not barred by *Rooker-Feldman* but that it was premature because a final definitive "taking" as required by *Williamson County* had not yet occurred. *Robinson v. Ariyoshi*, 887 F.2d 215, 216 (9th Cir.1989) (*Robinson II*).

The history of *Robinson I* and *Robinson II* and the Supreme Court's interjection of its *Williamson County* decision in that dispute, as well as the history leading to the overruling of the California Supreme Court's *Agins* rule, make it perfectly clear that the *Rooker-Feldman* doctrine does not deprive the District Court of jurisdiction over VGV's Fifth Amendment taking claim.

7. CONCLUSION.

For the reasons stated above, the judgment of the District Court should be reversed with direction to enter a partial summary judgment in Plaintiff's favor on the State's sovereign immunity, statute of limitations, failure to exhaust state remedies and *Rooker-Feldman* affirmative defenses.

DATED: February 20, 2004.

Respectfully submitted,

HEILY & BLASE
A Professional Law Corporation

By_____
JOHN R. JOHNSON
Attorneys for Plaintiff
Ventura Group Ventures, Inc.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned, counsel of record for Appellant Ventura Group Ventures, Inc. hereby certifies that there are no other cases pending before this Court that are related to this case.

DATED: February 20, 2004.

HEILY & BLASE
A Professional Law Corporation

By_____
JOHN R. JOHNSON
Attorneys for Plaintiff
Ventura Group Ventures, Inc.

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 32(a)(7) (C)(I)

I certify that the attached brief uses proportionately spaced type, has a typeface of 14 points or more, and contains 7,334 words.

DATED: February 20, 2004.

HEILY & BLASE
A Professional Law Corporation

By_____
JOHN R. JOHNSON
Attorneys for Plaintiff
Ventura Group Ventures, Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I am employed in the City and County of Ventura, State of California. I am over the age of 18 years, not a party to the action herein, and my business address is 590 Poli Street, Ventura, California 93001-2633.

On February 20, 2004, I served the foregoing document described as **APPELLANT'S OPENING BRIEF (Appellant's Excerpts of Record, Vols. 1-4 served and filed concurrently herewith)** on the interested parties to this action.

[X] **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon, fully prepaid, in the United States mail at Ventura, California;

[X] **BY OVERNIGHT DELIVERY**: I caused such envelope(s) to be delivered to the U.S. Court of Appeals for the Ninth Circuit by overnight, next business day delivery service

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on this 20th day of February, 2004.

Joi Kawaguchi Searson, CLA

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APPENDIX G

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 03-57004

[Filed March 24, 2004]

VENTURA GROUP VENTURES, INC., a California corporation, Plaintiff and Appellant,

v.

STATE OF CALIFORNIA, Defendant and Appellee.

APPELLEE'S BRIEF

On Appeal from the United States District Court for the Central District of California
No. CV 02-08785 HLH (Ex)
The Honorable Harry L. Hupp, Senior Judge

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03-57004

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VENTURA GROUP VENTURES, INC., a California corporation, Plaintiff-Appellant;	)
v.	)
STATE OF CALIFORNIA, Defendant-Appellee.	)

STATEMENT OF JURISDICTION

On October 27, 2003, the United States District Court (Central District of California) granted the State of California's Rule 12 (b) motion for summary judgment. Final judgment was entered on October 27, 2003. Plaintiff timely filed notice of appeal on November 7, 2003. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1331.

STATEMENT OF ISSUES

1. Did the District court correctly apply the relevant substantive law when it ruled that without its consent, the State of California may not be sued for damages in federal court for allegedly violating an individual's Fifth Amendment property rights?[1]

STATEMENT OF THE CASE

This is essentially an eleven-year-old lawsuit originally filed as a breach of contract action against the Ventura Port District (the District) in California state court. See, Ventura Group Ventures, Inc. v. Ventura Port District, 179 F.3d 840 (6th Cir, 1999); Ocean Services Corporation v. Ventura Port District, 15 Cal.App.4th 1762, 1768 (1993); Ventura Group Ventures v. Ventura Port District, 24 Cal.4th 1089 (2001).

VGV's predecessor in interest obtained a state-court judgment against the District that it could not completely satisfy because the District obtained bankruptcy protection. During the pendency of the District's bankruptcy proceedings, VGV sued in Federal court to determine whether the District could be compelled to raise property taxes (without voter approval as required by Article XIII A of the California Constitution) to pay the judgment. After this Court certified relevant questions to the California Supreme Court, it was determined that voter approval would be needed to raise taxes

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[1] Appellant's issue no. 1 suggests that this case is brought by a person "who has been denied payment of just compensation for property taken for public use .... " and that the person "exhausted all other possible avenues of recovery against the assets and revenues of the state's local district." The district court's decision never addressed these fact issues.

for this purpose. Ventura Group Ventures, Inc. v. Ventura Port District, 179 F.3d 840 (9th Cir.1999); Ventura Group Ventures. v. Ventura Port District, 24 Cal.4th at 1107.

VGV never sought voter approval to pay its judgment and it never sued the State of Califomia for violation of the California Constitution's takings clause. Cal. Const. art. I, § 19. Instead, VGV has re-characterized the original suit against the District and re-filed it as a Fifth Amendment takings action filed against the State of California in federal court.

The State of California moved for summary judgment pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The district court correctly granted the motion on the grounds that (1) although Fifth Amendment claims filed in the Ninth Circuit must be brought pursuant to 42 U.S.C. § 1983, such an action cannot lie in this case because the State is not a "person" within the meaning of the statute; and (2) the State of California is immune from suit pursuant to the Eleventh Amendment. Appellant's Excerpts of Record (AER), pp. 1013 - 1015.

STATEMENT OF FACTS

Unless otherwise indicated, the following statement of facts is derived entirely from this Court's published decision in Ventura Group Ventures, Inc. v. Ventura Port District, 179 F.3d 840 (9th Cir. 1999).

The District was organized by the County of Ventura in 1952 as a local governmental entity to operate and develop the Ventura Harbor in Ventura County, California. The District was created pursuant to California Harbors and Navigation Code § 6210. See Cal. Harb. & Nay. Code § 6210. The

District is governed by a board of port commissioners pursuant to section 6240. See id. § 6240.

In 1979, the District leased real property along the harbor to Ocean Services Corporation ("Ocean"), a corporation that had agreed to develop a commercial marina on the harborfront property. The District, however, failed to disclose a restrictive covenant on the property that prohibited the commercial development on part of the property for ten years. Once Ocean learned of the covenant, the District provided repeated assurances that the covenant would be removed quickly and at the District's expense. Ocean continued to plan the project, obtained the necessary licensing, preleased the property, guaranteed the loan payments for the necessary financing, and expended a large amount of money and effort to complete the development project.

Meanwhile, the owners of the restrictive covenant filed a lawsuit against the District and Ocean to enjoin the development of the project. In 1981, the owners successfully obtained a preliminary injunction. In 1982, Ocean informed the District that its losses on the project had reached $1.8 million due to the injunction. In 1983, the parties settled the restrictive covenant lawsuit, but the District refused to renegotiate Ocean's lease or cover any of Ocean's losses.

In January 1984, Ocean filed a lawsuit in California Superior Court for Ventura County against the District for breach of contract, deceit, and promissory estoppel. The parties continued to have difficulties with the terms of the lease and with the development of the property. In 1987, Ocean filed for reorganization under Chapter 11. The District secured an order from the bankruptcy court declaring that the lease between the District and Ocean had been rejected, and then evicted Ocean from the property and took control of the

marina facilities. In 1988, Ocean converted the bankruptcy proceeding to Chapter 7, but the court permitted Ocean and its creditors to continue to pursue the lawsuit against the District.

At trial, Ocean argued that the District had breached the implied covenant of quiet enjoyment and the implied covenant of good faith and fair dealing. On September 25, 1990, a jury awarded Ocean $31,352,595, which the trial judge later reduced to $16,971,767.

In 1991, Ocean recorded an abstract of judgment against the District. Ocean believed that its abstract of judgment created a judgment lien against the District and secured creditor status for itself. At the same time, the District recorded an "Extinguishment of Lien." The District then encumbered a portion of its real property in a series of transactions, one of which resulted in the District's giving a deed of trust against some of its property to Merchants Bank of Kansas City.

In April 1990 and pursuant to Ocean's Chapter 7 proceeding, Ocean sold and assigned its cause of action against the District to a new corporation formed by Ocean's former shareholders, VGV.

In May 1993, a California appellate court affirmed VGV's verdict, see Ocean Servs. Corp. v. Ventura Port Dist., 15 Cal.App.4th 1762, 1782 (1993), but in an unpublished portion of the decision, reduced the award to $15,560,169, plus costs and interest.

On August 20, 1997, VGV flied an action in California Superior Court for the County of Ventura to enforce the judgment. VGV sued the District, the County of Ventura,

Merchants Bank of Kansas City, and other parties that VGV believed would contest the priority of VGV's judgment against the District. First, VGV sought a declaratory judgment that the District and the County were required under state law to pay the judgment either by selling property or levying additional taxes or assessments, or that in the alternative, VGV could execute against the District's property. Second, VGV asked for a writ of mandate against the District and the County in the amount of the judgment. VGV included a claim for slander of title against the individual attorneys for filing the Extinguishment of Lien. VGV also sought a determination that its abstract of judgment gave it priority over the District's other creditors.

Immediately thereafter, the District filed a Chapter 9 petition, and VGV's claims against the District were automatically stayed. The bankruptcy court granted VGV relief from the automatic stay, permitting VGV to go forward solely with its claim for a declaratory judgment to determine if VGV could force the District or the County of Ventura to levy a property tax in order to pay the judgment.

After VGV's complaint was filed, the Federal Deposit Insurance Corporation ("FDIC") became the receiver for Merchants Bank of Kansas City and, as a party defendant, removed the case to the U.S. District Court for the Central District of California. The district court then remanded the slander of title claims to state court. All that remained in the federal case was the claim for a declaratory judgment; determining the rights and obligations of VGV the District, and Ventura County regarding the payment of VGV's state court judgment, and a determination of whether an abstract of judgment against a public entity could create a judgment lien giving VGV priority over the District's other creditors.

In January 1997, pursuant to its grant of summary judgment to Ventura County and its final judgment after a bench trial, the district court held that: (1) Proposition 13 prohibited the County from levying an additional property tax to satisfy VGV's judgment, (2) Proposition 13 and California Revenue and Taxation Code § 95 prohibited the County from reallocating revenue generated from permissible property taxes to satisfy the judgment, (3) the District could not levy a special assessment to satisfy VGV's judgment, (4) VGV could not proceed with a writ of execution against the District's property, (5) VGV's abstract of judgment did not create a judgment lien for the purpose of establishing VGV's priority and (6) the other creditors had superior liens to VGV.

The district court did hold that VGV could obtain a writ of mandate against the District for the purpose of satisfying the judgment, and that a court considering the issuance of the writ could order the District to sell some of its property to satisfy the judgment. The District did not cross-appeal this determination. VGV limited its Ninth Circuit appeal to the consideration of the first three issues listed in the preceding paragraph along with federal constitutional claims and agreed to dismiss its appeal as to all defendants except the District and the County.

In April 1998, the Chapter 9 bankruptcy court approved the District's modified plan of debt adjustment. As part of the plan, VGV received $7,739,821.23 pursuant to its unseeded status. Although the bankruptcy court noted the district court's determination against VGV, the modified plan provided that VGV retained the right to pursue its appeal of the district court's judgment in the Ninth Circuit. If the appeal is successful, the bankruptcy court stated: [T]he District will levy the tax as directed by the Ninth Circuit, or, if the subject proceedings are remanded, by the District Court so that the

tax will be included in the real property tax bills issued by the Ventura County Tax Collector. If and when such taxes are collected by the County of Ventura and remitted to the District, the District shall distribute the funds as required by applicable law or order of court. On December 10, 1998, the Chapter 9 proceeding was closed.

The following facts pertain to this Court's decision in Ventura Group Ventures, Inc. v. Ventura Port District, 179 F.3d 840 (9th Cir. 1999) or derive from events which occurred thereafter: On June 28, 1999, this Court certified two questions to the California Supreme Court: (I) Does Article XIII A of the California Constitution (adopted in 1978 by statewide initiative as Proposition 13) prohibit a county from levying property taxes, in excess of the 1 percent limit, pursuant to California Harbors and Navigation Code § 6361 to pay a money judgment as required by California Government Code §§ 970-971, and (2) Does a port district created pursuant to California Harbors and Navigation Code § 6210 have independent authority to impose assessments under California Harbors and Navigation Code § 6365(d)(2) in order to raise the funds needed to satisfy a judgment obtained against it? This Court did not limit the California Supreme Court's inquiry: "Our phrasing of the issues should not restrict the Court's consideration of the issues." Ventura Group Ventures, Inc. v. Ventura Port District, 179 F.3d at 841.

VGV's brief on the merits in the California Supreme Court raised the Fifth Amendment Takings Clause issue. AER, pp. 165 - 168. On February 15, 2001, the California Supreme Court held, again in pertinent part, that: (1) Under the facts of this case; article XIII A does prohibit a county from levying property taxes in excess of 1 percent to pay a money judgment under Harbors and Navigation Code section

6361 and Government Code sections 970 to 971, and (2) Proposition 13 does not violate the takings clause. Ventura Group Ventures v. Ventura Port District, 24 Cal.4th 1089 (2001).

On August 29, 2001, this Court affirmed the district court's January 1997 decision after receiving the California Supreme Court's responses to the certified questions. Ventura Group Ventures v. Ventura Port District, 17 Fed.Appx. 676, 2001 W-L 1:006415 (9th Cir. 2001).

On November 15, 2002, VGV filed the present action against the State of California. AER, pp. 1 - 15.

The State of California has not been a defendant in any of the prior lawsuits or a debtor in any of the bankruptcy proceedings involving this matter.

VGV never asked Ventura County voters to vote on the question whether they would agree to compensate VGV for its alleged loss. Ventura Group Ventures v. Ventura Port District, 24 Cal.4th at 1107.

On August 25, 2003, defendant State of California filed a motion for summary judgment based strictly on procedural issues. AER, pp. 44 - 48; 49 298; 994- 1004; 1026.

On October 27, 2003, the District court entered final judgment on behalf of the State of California and against plaintiff. AER, pp. 1013 - 1016.

Plaintiff timely filed notice of appeal on November 7, 2003. AER, pp. 1017- 1021.

SUMMARY OF ARGUMENT

The district court correctly applied Supreme Court and Ninth Circuit precedent in holding that: (1) A Fifth Amendment takings claim must be brought pursuant to 42 U.S.C. § 1983 but the State of California cannot be subject to such a suit because it is not a "person" within the meaning of the statute; and (2) the State of California also is immune from suit pursuant to the Eleventh Amendment. Appellant's argument that the Fourteenth Amendment should be sufficient, in and of itself, to abrogate state sovereign immunity has been rejected by the Supreme Court.

STANDARD OF REVIEW

A grant of summary judgment is appropriate where the evidence, read in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Cir. P. 56(c); Taylor v. List, 880 F.2d 1040, 1044 (9th Cir. 1989). To defeat a summary judgment motion, the nonmoving party must come forward with evidence sufficient to establish the existence of any elements that are essential to that party's case, and for which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Taylor, 880 F.2d at 1045, A summary judgment motion cannot be defeated by conclusory allegations unsupported by factual data. Taylor, 880 F2d at 1045.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED THE RELEVANT SUBSTANTIVE LAW WHEN IT RULED THAT WITHOUT

ITS CONSENT, THE STATE OF CALIFORNIA MAY NOT BE SUED FOR DAMAGES IN FEDERAL COURT FOR ALLEGEDLY VIOLATING AN INDIVIDUAL'S FIFTH AMENDMENT PROPERTY RIGHTS.

A. Fifth Amendment Actions May Only Be Brought Pursuant to 42 U.S.C. § 1983, but the State May Not Be Sued under That Provision Because it Is Not a "Person" Within the Meaning of the Statute.

In Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992), an owner of a mobile home park brought an action against the city, alleging that the city's rent control provision relating to mobile home parks effected an unconstitutional taking. On rehearing, this Court held that "[p]laintiff has no Cause of action directly under the United States Constitution." Id. A plaintiff who complains that its constitutional rights have been violated must utilize 42 U.S.C. § 1983. Id.; Bank of Lake Tahoe v. the BankofAmerica, 318 F.3d 914, 917 (6th Cir. 2003) (Lawsuits improperly brought as direct actions under the United States Constitution are construed as 42 U.S.C. § 1983 proceedings.) But a state cannot be sued under section 1983 because it is not a "person" within the meaning of the statute. Bank of Lake Tahoe, 318 F.3d at 917 - 918.

B. The State of California Also Is Immune From Suit Pursuant to the Eleventh Amendment.

1. The Eleventh Amendment:

The Eleventh Amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State." U.S. Const., Amend. XI. "It has long been settled that the amendment applies equally to suits against a state brought in federal court by citizens of that state. Hans v. Louisiana, 134 U.S. 1, 18 - 19, 10 S. Ct. 504, 33 L.Ed. 842 (1890).

2. No Exception to Eleventh Amendment Immunity Applies in This Case.

The Eleventh Amendment creates a sovereign immunity which "the states enjoy save where there has been a surrender of this immunity in the plan of the convention." Idaho v. Coeur d'Alene Tribe Idaho, 521 U.S. 261,117 S.Ct. 2028, 2033, 138 L.Ed.2d 438 (1997). There are three situations in which there is a "surrender" of the Eleventh Amendment sovereign immunity: (1) When the state waives its right to immunity and consents to suit, see Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985); (2) when Congress, acting pursuant to section 5 of the Fourteenth Amendment, abrogates a state's immunity by expressing an unequivocal intent to do so Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55-73, 116 S.Ct. 1114, 1123-1132, 134 L.Ed.2d 252 (1996); Alden v. Maine, 527 U.S. 706, 756, 119 S. Ct. 2240, 2267, 144 L. Ed. 2d 636 (1999);[2] and (3) when a state official is sued for

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[2] The Alden Court recognized an additional limitation on Eleventh Amendment immunity in that it bars suits against states but not the

prospective injunctive relief to end a continuing violation of federal law, Ex Parte Young, 209 U.S. 123.155-156, 28 S. Ct. 441,452, 52 L. Etl. 714 (1908); Harbert International, Inc. v. James, 157 F.3d 1271, 1278 (11th Cir. 1998).

In Harbert, a government contractor entered into a contract with state officials for the construction of a bridge. After state officials allegedly failed to make payments and perform contractual duties, plaintiff unsuccessfully attempted to satisfy its claims through state administrative procedures. Plaintiff then filed suit in federal court against the state officials alleging that they took its property in violation of the Fifth Amendment. Id. at 1274 - I275.

Defendants moved for summary judgment on the grounds that in their official capacity, they are immune from suit pursuant to the Eleventh Amendment. Finding that none of the three exceptions to Eleventh Amendment immunity existed, the district court granted defendants' motion. Id. at 1278. Plaintiff acknowledged that none of the three exceptions existed but argued that since it has an absolute right to just compensation, and since state law did not provide any remedy, the Eleventh Circuit should recognize the absence of a state remedy as a fourth exception to immunity "within the plan of the convention." Id. The Court of Appeal determined, however, that state law did in fact provide plaintiff with a means of redress, and, on that basis, affirmed the district court's decision. Id. The same reasoning should apply in this case.

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lesser entities such as municipal corporations or other governmental entitles that are not arms of the state. Alden, 527 U.S. at 756.

3. California Law Provides an Adequate Remedy.

Article I, section 19 of the California Constitution provides in part that "[p]rivate property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." Cal. Const. art. I, § 19. Whereas the Fifth Amendment takings clause addresses private property taken for public use, the California Constitution also provides coverage for property damaged for public use. "As a result, article I, section 19 of the California Constitution protects what the California Supreme Court has characterized as 'a somewhat broader range of property values.'" NJD Ltd. v. City of San Dimas, 110 Cal.App.4th 1428, 1434 (2003).

Article XIII A, section 1 of the California Constitution provides:

> (a) The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.
>
> (b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on (1) [i]ndebtedness approved by the voters prior to July 1, 1978, or (2) [b]onded indebtedness for the acquisition ... of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition.

Cal. Const. art. XIII A, § 1, Article XIII A prohibits a county from levying property taxes in excess of 1 percent to pay a money judgment under Harbors and Navigation Code section 6361 and Government Code sections 970 to 971, unless the voters approve the increase. Ventura Group Ventures v. Ventura Port District, 24 Cal.4th 1089 (2001).

California state law provides more than adequate remedies to recover compensation for property a private party contends the State took for public use. VGV did not sue the State of California in state court under California's takings clause, however, nor did it seek voter approval for compensation through an increase in property taxes. As a result, VGV's lawsuit against the State of California is barred. Moreover, Alden, Seminole Tribe, Harbert, and the Rooker-Feldman doctrine establish that the State of California would be entitled to judgment as a matter of law even if plaintiff had availed itself of a State Constitutional action against the State of California. Although it is not controlling authority, the facts and issues presented in Harbert are virtually identical to the ones presented in this case. The same conclusion should be reached in this case.

4. The Fourteenth Amendment Does Not, in and of Itself, Abrogate the State of California's Immunity.

VGV argues that the Fourteenth Amendment in and of itself should be sufficient to abrogate the State's Eleventh Amendment immunity. But only Congress, acting pursuant to section 5 of the Fourteenth Amendment, has the authority to abrogate a state's immunity and if it does so it must do so by unequivocally expressing such an intent. Alden v. Maine, 527 U.S. at 756; Seminole Tribe of Florida v. Florida, 517 U.S.

at 55-73; Harbert International Inc. v. James, 157 F.3d at 1278.

Congress has not acted pursuant to its section 5 authority to make the State of California subject to suit in federal court on plaintiff's Fifth Amendment action for damages.

II. UNLESS THIS COURT AFFIRMS THE DISTRICT COURT'S DECISION, THE MATTER SHOULD BE REMANDED TO THE DISTRICT COURT WITH INSTRUCTIONS TO DECIDE THE REMAINDER OF THE STATE OF CALIFORNIA'S MOTION FOR SUMMARY JUDGMENT.

In its motion for summary judgment, the State of California raised numerous procedural defenses. See AER, pp. 44 - 46. After concluding that the State could not be sued because of the bars imposed by 42 U.S.C. § 1983 and the Eleventh Amendment, the district court expressly declined to decide any of the other defenses the State raised. AER, p. 1015. Of course, this Court may affirm the judgment below on any grounds, and if the Court is so inclined, rather than burden the Court with additional material in this brief, the State would incorporate its briefing on the various defenses set forth in its summary judgment. AER, pp. 44 - 48; 49 - 298; *994* - 1004.

Except for the 42 U.S.C. § 1983 and Eleventh Amendment issues, the district court did not reach any of the State's other procedural defenses. If this Court does not affirm the district court's decision, the matter should be remanded for further proceedings to address the remainder of the State's grounds for summary judgment.

CONCLUSION

As set forth above, the State of California may not be sued for damages in federal court directly under the Fifth Amendment on a theory that it took plaintiff's property without compensation. Moreover, pursuant to the Eleventh Amendment, the State is immune to suit brought in federal court under 42 U.S.C. § 1983.

From a practical perspective, it does not matter that the law requires that such suits be brought pursuant to a federal statute that does not apply to a state, states are immune from such suits pursuant to the Eleventh Amendment. This result does not leave plaintiffs in appellant's position without an adequate and just remedy. The California Constitution provides appellant with a takings cause of action that is even broader than the Fifth Amendment. It also provides plaintiffs in appellant's position with a means of obtaining voter approval to pay compensation. The sovereign immunity states reserved to themselves when the federal Constitution was formed mandate that if an individual contends the State took its property without just compensation, the forum to seek relief is in state, not federal, court. For the foregoing reasons, the State of California respectfully requests that the Court affirm the district court's decision to grant the State's motion for summary judgment.

Dated: March 24, 2004.

Respectfully submitted,
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Attorney General of the State of California
LOUIS G. MAURO
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Deputy Attorney General
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/s/ _____
ROBERT D. WILSON
Deputy Attorney General
Attorneys for Defendant and Appellee
State of California

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned, counsel of record for the State of California, hereby certifies that there are no other cases pending before this Court that are related to this case.

Dated: March 24, 2004.

Respectfully submitted,
BILL LOCKYER
Attorney General of the State of California
LOUIS G. MAURO
Senior Assistant Attorney General
KENNETH R. WILLIAMS
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Deputy Attorney General

/s/ _____
ROBERT D. WILSON
Deputy Attorney General

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State of California

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

I certify that the attached brief uses proportionately spaced type, has a typeface of 14 points or more and contains 4,265 words.

Dated: March 24, 2004.

Respectfully submitted,
BILL LOCKYER
Attorney General of the State of California
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State of California

DECLARATION OF SERVICE

Case Name: Ventura Group Ventures, Inc. v. State of California

Case No.: 03-57004

I, S. Barshefski, declare and state as follows: I am employed in the Office of the California Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; my business address is 300 S. Spring Street, Los Angeles, California 90013.

On March 24, 2004, I served the attached

APPELLEE'S BRIEF

on the interested parties to this action as follows:

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Hon. Harry L. Hupp
United States District Court
312 N. Spring St., Ctrm. 7
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Attorneys for Plaintiff and Appellant

I caused each such envelope to be placed the United States mail at Los Angeles, California. I am readily familiar with the

practice of the Office of the Attorney General for the collection and processing of correspondence for mailing with the United States Postal Service and that correspondence is deposited with the United States Postal Service on the same day, with postage fully prepaid, in the ordinary course of business.

I declare under penalty of perjury the foregoing is true and correct. This declaration was executed on March 24, 2004, at Los Angeles, California.

/s/ _____
S. Barshefski, Declarant

APPENDIX H

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 03-57004

[Filed February 20, 2004]

VENTURA GROUP VENTURES, INC., a California corporation, Plaintiff-Appellant;	) Appeal No. 03-57004
v.	) United States District Court, Central District of California
STATE OF CALIFORNIA, Defendant-Appellee.	) Case No. CV-02 8785 HLH (Ex)

APPELLANT'S REPLY BRIEF

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ARGUMENT

1. THE STATE CONCEDES THE DISTRICT COURT ERRED WHEN IT DISMISSED THIS CASE BASED ON PRINCIPLES OF SOVEREIGN IMMUNITY.

The State of California continues to avoid a candid discussion of the critically important issue raised by this case. As the District Court made perfectly clear, that issue is whether the States upon ratifying the Fourteenth Amendment waived any immunity they enjoyed, under the plan of the original Convention, to refuse to pay just compensation when private property is taken for public use. The fact that "Congress, acting pursuant to section 5 of the Fourteenth Amendment, has the authority to abrogate a state's immunity" (Appellee's Brief, page 20) has nothing to do with this question.

Once the United States Supreme Court determined that the Fourteenth Amendment itself waived the States' immunity from a suit for money damages in one limited area, i.e., private suits seeking just compensation for property take for public use, as it did in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897) ("*Chicago, Burlington*") there was no immunity for Congress to abrogate.

The State has virtually conceded the point by it refusal its refusal to acknowledge the existence *Chicago, Burlington* and its progeny including *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172 (1985) ("*Williamson County*") and *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) ("*Suitum*"). None of these important cases are mentioned or discussed in the State's Appellee's Brief. Instead, the State continues to suggest argue that *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704,

705 (9th Cir.1992) ("*Azul-Pacifico II*") and *Bank of Lake Tahoe v. Bank of America* 318 F.3d 914 (9th Cir. 1992) ("*Bank of Lake Tahoe*") determined *sub silento* that a Fifth Amendment taking claim *against* a state could not be maintained under the Fourteenth Amendment under *Chicago, Burlington* and its progeny although the panels hearing those cases were not called upon to consider much less decide this important issue.

Nor does the State challenge VGV's analysis that *Chicago, Burlington* and its progeny have of necessity rejected any notion that sovereign immunity as articulated in *Hans v. Louisiana*, 134 U.S. 1 (1890) can be applied to a suit against a state for just compensation under the Fifth Amendment. Nor can the State take exception with VGV's analysis, that the States' legitimate sovereign rights have been carefully protected and preserved by the federal courts in their articulation of the important restrictions that govern federal taking jurisprudence. *Chicago, Burlington* and its progeny did not throw open the doors of the federal courts to hear such claims. Rather, they have held, out of deference to the States' status as sovereigns, that no federal claim would be recognized as long as state law provided a reasonable means for one whose property had been taken to secure just compensation.

As the *Williamson County* Court explained:

> "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking. *Monsanto*, 467 U.S., at 1013, 1018, n. 21, 104 S.Ct., at 2878, 2881, n. 21. Thus, we have held that taking claims against the Federal Government are

> premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. *Monsanto*, 467 U.S., at 1016-1020, 104 S.Ct., at 2880-2882. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County, supra*, 473 U.S. at 194-195.

The State not only refuses to discuss the evolution of federal "taking" jurisprudence under *Chicago, Burlington* and its progeny, it refers the Court to the Eleventh Circuit's decision in *Harbert Intern., Inc. v. James* 157 F.3d 1271, 1277 - 1279 (11th Circuit 1998) ("*Harbert*") to incorrectly suggest that *Hans v. Louisiana* sovereignty principles were applied there to bar a suit against the State of Alabama, when the unvarnished truth is that the sovereignty principles articulated in *Williamson County* and not those articulated *Hans v. Louisiana* controlled the outcome of that case:

> "If Harbert can prove those allegations, Milton and Dunn establish that Harbert can bring an action in Alabama state court to force the defendants to complete the administrative procedures necessary to process Harbert's claim, or to release the funds Harbert is due under the contract, or both. Because Alabama state courts provide Harbert with an avenue of relief for its takings claim, we need not decide whether there is a fourth exception to the Eleventh Amendment's bar against suits against a state in federal court." *Harbert Intern., Inc., supra* 157 F.3d at 1279.

Apparently anticipating that the Court will agree with VGV that sovereign immunity as articulated in *Chicago, Burlington* and its progeny and not *Hans v. Louisiana* govern this case and reverse the District Court, the hints that other grounds exist that might support the dismissal of VGV's case. First, it seems to suggest that VGV's Fifth Amendment claim is, like Harbert's was, premature because Article 1, section 19 of the *California Constitution* allows VGV to sue the State for just compensation if it can prove its property was taken for public use (Appellee's Brief, page 17) but in the next breath alluding to *Rooker Feldman* doctrine the State says it "would be entitled to judgement as a matter of law" if VGV did bring a claim under Article 1, section 19 of the *California Constitution* (Appellee's Brief, page 18). It also suggests that VGV's case should be dismissed based on some fantasy that the Ventura Port District voters would have approved a tax increase to pay the full amount of just compensation VGV had been awarded.

Finally, the State makes a most remarkable request of this Court. It asks the Court to consider these and all of the other alternative grounds raised by it in the District Court (whether briefed before this Court or not) to affirm the dismissal but asks the Court to refrain from discussing, in its decision on this appeal, any of its arguments the Court finds have no merit. (Appellee's Brief, page 20-21.) VGV would urge the Court in the interest of judicial economy to render a comprehensive opinion addressing all sovereign immunity related issues under *Williamson* including the State's statute of limitation, failure to exhaust state law remedies and *Rooker Feldman* defenses that were briefed by VGV in its Appellant's Opening Brief.

2. ALL THAT AWAITS VGV IN STATE COURT IS FURTHER DELAY AND SANCTIONS.

The State is correct that were VGV forced to seek compensation from the State under state law the State "would be entitled to judgement as a matter of law." This result must follow because the California Supreme Court's unsolicited *sua sponte* comment that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment" is binding on the lower state courts. VGV's only hope of recovery under state law would require a reversal of that holding. More troubling is that VGV would be subject to sanctions were it to suggest before a state court that discharge of the District's debts in a bankruptcy proceeding can be construed as a taking in violation of the Fifth Amendment after the California Supreme Court has held such a claim to be unreasonable and meritless.

State law allows sanctions to be imposed for the prosecution of actions and appeals that any reasonable attorney would agree are totally and completely without merit. *In re Marriage of Flaherty* 31 Cal.3d 637, 649-650 (1982). Litigating claims barred by res judicata or amounting to spurious circumvention of a prior decision are particularly subject to the imposition of sanctions. Cf. *Beckstead v. International Industries, Inc.* 127 Cal.App.3d 927, 934-935, 179 Cal.Rptr. 767 (1982) and *Nelson v. Crocker Nat. Bank* 51 Cal.App.3d 536, 541, 124 Cal.Rptr. 229 (1975).

In 1897, the *Chicago, Burlington* Court held that the Fifth Amendment's requirement of just compensation was binding on the States by virtue of the Fourteenth Amendment. But, since the Fifth Amendment's does not prohibit the taking of private property for public use, the rule has evolved that federal judiciary simply cannot restrain the taking of private

property for public use by either the state or federal government. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172, 190, 194 (1985). There is but one way that the mandatory requirement of "just compensation" can be enforced. That is by an award of money damages against an offending state.

The sovereign right of each State to define for itself whether it will submit to private suits for money damages established in *Hans v. Louisiana*, which is the fountainhead for each of the cases cited by the District Court, cannot be applied to defeat a claim *against a state* for just compensation under the Fifth Amendment, if only because to do so would render the Fifth Amendment unenforceable against the States. If the remedy of "just compensation" for property taken for public use cannot be enforced by the federal judiciary, then whether just compensation will be allowed or not is entirely optional at the sole discretion of each sovereign state's lawmakers. Not a single case cited by the District Court supports such a drastic and draconian result.

While it may well be, that looking at the original Constitution only, as the *Hans v. Louisiana* Court did, one could concluded that the States would be immune from damage claims for compensation by persons whose private property had been taken for public use, no one can make that suggestion after the Fourteenth Amendment was adopted. As *Chicago, Burlington* made clear, the Fourteenth Amendment guarantees that where private property has been taken for public use the federal courts are required to provide a just compensation remedy *if state law did not*.

3. THE JUDICIARY'S AUTHORITY TO ENFORCE THE FIFTH AMENDMENT COMES FROM THE

CONSTITUTION AND 28 U.S.C. 1331, NOT FROM 42 U.S.C. 1983.

This Circuit did not hold in *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir.1992) ("*Azul-Pacifico II*"), that a takings claim *against* a state "must be presented through an action brought pursuant to 42 USC §1983." (Emphasis in the original.) The defendant in that case was the City of Los Angeles. The United States Supreme Court has repeatedly held that local public entities of a state (like the City of Los Angeles) were "persons" Congress intended to subject to claims for money under 42 *U.S.C.* § 1983. What the Court said in *Azul-Pacifico II* was that since Congress had provided Azul-Pacifico a *reasonable* money damage remedy to secure just compensation from the City of Los Angeles under 42 *U.S.C.* § 1983, Azul-Pacifico was required to pursue that *statutory* remedy within the time allowed by law, precisely what *Williamson County* required Azul- Pacifico to do. The *Azul-Pacifico II* Court had no occasion to consider or discuss the effect, if any, of 42 *U.S.C.* § 1983 to a just compensation claim against a state which could not be sued for just compensation under 42 U.S.C. §1983.

History is once again clear. While a state's local political subdivisions are "persons" for purposes of a money damage award under 42 *U.S.C.* § 1983, the United States Supreme Court has repeatedly held that the States are not. As to the States the High Court concluded that Congress had not used sufficiently precise language in 42 *U.S.C.* § 1983 to support a finding that it had intended to "abrogate" the States' *Hans v. Louisiana* sovereign immunity from suit for money damages. For this reason and this reason alone, the United States Supreme Court has made it clear that an injured party cannot use 42 *U.S.C.* § 1983 as the vehicle to secure a money

judgment against a state like California. (See, e.g., *Quern v. Jordan* 440 U.S. 332, 59 L.Ed.2d 358 (1979) and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("*Michigan State Police*").

But, to reason as the District Court did, that without a remedy under 42 *U.S.C.* § 1983, VGV cannot state a claim for "just compensation" against the State under the Constitution itself begs the question. Congress does not have the power to amend the Constitution or overrule the *Chicago, Burlington* Court's determination that the Fifth Amendment's just compensation remedy was directly enforceable against the States under the Fourteenth Amendment. Ironically, the line of cases relied on by the District Court makes it perfectly clear that Congress does not have the power (by failing to clearly articulate its intent to abrogate the States sovereign immunity) to render the Fifth Amendment unenforceable against the States. For example, in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) ("*Kimel*") one of the more recent decisions on the subject of sovereign immunity the majority said:

> "Congress cannot decree the substance of the Fourteenth Amendment's restrictions on the States . . . It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. (authority omitted). The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch. (Authority omitted)." (Emphasis added.) *Kimel, supra*, 528 U.S. 62 at 80.

The United States Supreme Court has long held that "[t]he Constitution has declared that just compensation *shall* be paid." *Monongahela Navigation Co. v. United States*, 148

U.S. 312, 327; 13 S.Ct. 622, 626; 37 L.Ed. 463 (1893). (Emphasis added.) And, that the Constitution itself provides both the [just compensation] cause of action and the remedy. *Jacobs v. United States*, 290 U.S. 13, 16, 54 S.Ct. 26, 27, 78 L.Ed. 142 (1933). The Judicial Branch is the branch charged with the enforcement of that cause of action and remedy. The District Court had jurisdiction over this federal question dispute arising under the Constitution under 28 U.S.C. § 1331, and it erred in dismissing VGV's case on the ground that 42 *U.S.C.* § 1983 was VGV's exclusive remedy.

The Ninth Circuit's *Bank of Lake Tahoe* decision is also of no assistance in the case at bar. Although a state was sued in that case, there was no Fifth Amendment claim put forward against it. The only federal claim advanced there was against state regulators under the Equal Protection clause and the only relief sought was an injunction. In *Exparte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court had held that states and state officials, acting in their official capacities, are "persons" subject to suit in federal court under 42 *U.S.C.* §1983 if a person is seeking non-monetary prospective relief rather than damages payable from the state treasury. *Michigan State Police* did not change this rule. After *Michigan State Police* was decided, states continued to be "persons" under §1983 for purposes of this type of action. The Supreme Court still considers the most important application of *Exparte Young* "to be where there is no state forum available to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 271, 117 S.Ct. 2028 (1997).

Bank of Lake Tahoe did not confront any issue of sovereign immunity. It simply dismissed the plaintiffs' request

for an injunction against state regulators under 42 *U.S.C.* §1983 because it had no factual support. The Ninth Circuit, observing that to secure such relief a plaintiff must "demonstrate a reasonable likelihood of future injury," affirmed the dismissal of that cause of action because "[n]othing has been alleged from which we can conclude that either Bourdeau or BLT face a likely threat of future injury." *Bank of Lake Tahoe, supra,* 318 F.3d at 918.

Cases like *Bank of Lake Tahoe* brought against a state in federal court under *Exparte Young* do, however, make it perfectly clear why a private party has a federal cause of action for damages against a state under the Just Compensation Clause. *Chicago, Burlington* and its progeny, and in particular *Williamson County*, make it perfectly clear that an injunction cannot be issued to prohibit a taking of private property by a state or one of its local entities. Since prospective relief under *Ex parte Young* is not available in such situations, the only means available to enforce Just Compensation Clause is an action to collect money damages. It has been unquestioned since *Chicago, Burlington* was decided that if a state does not provide a reasonable means to secure just compensation after the property is taken, the federal courts will. That is still the rule in this Circuit.

Anticipating that the State will urge this Court to affirm the judgment on alternative grounds, VGV will address the State's claim that federal bankruptcy law, rather than state law, took the "just compensation" VGV had been awarded against the District. It will also address the State's failure to exhaust state remedies and *Rooker Feldman* defenses, at this time. These issues are all tied in one fashion or another to the California Supreme Court's unsolicited *sua sponte* comment that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in

violation of the Fifth Amendment." If the State, in its Respondent's Brief, suggests other alternative grounds that may require the Court to affirm the judgment, VGV will address them in its Reply Brief.

4. THE CHAPTER 9 DISCHARGE OF THE JUDGMENT AGAINST THE DISTRICT DID NOT TAKE ANY PROPERTY FROM VGV.

California Supreme Court's comment that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment" is ambiguous in the context it was made. The prior action against the District involved California's sovereign right to control the finances of its local political subdivisions. Had state law not prohibited a levy of local taxes to pay the judgment against the District, VGV would have recovered the full amount of just compensation it had been awarded against the District.[1] But once the People of California, its Legislature, or its highest court determined that state law prohibited a levy of local taxes to pay the balance owed on the judgment against the District, the Bankruptcy Court's hands were tied. (Compare, *United States v. Bekins*, 304 U.S. 27, 33; 58 S.Ct. 811, 812; 82 L.Ed. 1137 (1938) with *Ashton v. Cameron County District*, 298 U.S. 513; 56

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[1] If the District had the power to tax, governing federal law would have required the Bankruptcy Court to dismiss the District's Chapter 9 case if the District refused to exercise that power. See, e.g., *Lorber et al. v. Vista Irr. Dist.*, 127 F.2d 628, 638 (9th Cir. 1942). Upon dismissal of the Chapter 9 case, California law clearly required its courts to issue a writ of mandate to require the District to levy taxes to pay the judgment. See, e.g., *May v. Board of Directors* 34 Cal.2d 125, 208 P.2d 661 (Cal. 1949).

S.Ct. 892; 80 L.Ed. 1309 (1936). The Bankruptcy Court had to discharge the balance owed on the judgment provided the District's plan provided VGV with an amount that it could reasonably expect to recover were it to enforce the judgment under state law.

As far as federal law was concerned, the case against the District established nothing more than a state's sovereign power to prohibit, or make optional, the payment of just compensation by its local public entities. In that case, the federal courts did not and could not consider or address the consequences to the State itself under the Fifth Amendment when it exercised its power to control local districts in this fashion. As discussed more fully in the next section, the fact that this was not an issue that could be resolved in the prior case against the District is precisely why *Rooker-Feldman* does not preclude it from being considered now.

Under *Chicago, Burlington* the State had the obligation to provide a reasonable statewide means for persons to obtain just compensation for a taking of private property for public use by any one of its many separate local entities. The facts bearing on this issue are not disputed. The California Supreme Court's own decision shows that California failed to provide what the Constitution required. It holds that state law gave the District discretion to deliberately breach the implied covenant of good faith in order to acquire OSC's property. It also held that state law (*Cal. Rev. & Tax. Code* §§ 2205 and 2271) flatly prohibited a levy of local taxes to pay for what was taken.

There is also no dispute as to the controlling federal law. As Justice Scalia put it in his concurring opinion in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 748, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997):

> ". . . once there is a taking, the Constitution requires just (i.e., full) compensation, see, e.g., United States v. 564.54 Acres of Monroe and Pike County Land, 441 U.S. 506, 510, 99 S.Ct. 1854, 1856, 60 L.Ed.2d 435 (1979) (owner must be put 'in as good a position pecuniarily as if his property had not been taken'); Monongahela Nav. Co. v. United States, 148 U.S. 312, 326, 13 S.Ct. 622, 626, 37 L.Ed. 463 (1893) ("[T]he compensation must be a full and perfect equivalent for the property taken") . . ."

A remedy that allows recovery in 1998 of only $7.7 million dollars for a judgment awarding VGV just compensation of $15.6 million dollars in 1991 for property the District had taken for public use in 1987 is patently unreasonable under this standard.

5. VGV HAS EXHAUSTED ALL STATE REMEDIES AGAINST THE DISTRICT AND IT IS CLEAR THAT VGV HAS NO REMEDY AGAINST THE STATE UNDER STATE LAW.

Federal taking jurisprudence articulated by the United States Supreme Court over the past 100 years from *Chicago, Burlington* to *Williamson County* to *Suitum* does not ignore the States' status as sovereigns. To the contrary, out of respect for it, a stern, unbending and iron clad principal of federal taking jurisprudence has evolved. No federal court has jurisdiction to consider a "taking" claim under the Fifth Amendment against a state unless the plaintiff has first exhausted the remedies available to secure just compensation under state law and the plaintiff has come away with less than the "just compensation" mandated by the Fifth Amendment or can establish that the state remedy will not result in full compensation. *Suitum, supra*, 520 U.S. at 738.

VGV has satisfied the required conditions precedent to the filing of this action. It has exhausted all means of securing just compensation from the District. The Bankruptcy Court's order determined the amount of just compensation VGV would be denied if state law prohibited a levy of local taxes to pay the judgment. Upon the United States Supreme Court's denial of VGV's petition challenging the enforceability of a state law that makes the payment of just compensation optional at the behest of local taxpayers on March 18, 2002, the amount of VGV's damage became fixed, definite and certain. Only then did VGV cause of action against the State accrue. This action was filed on November 15, 2002 well before the one year had passed.

Since the California Supreme Court by its response to the Ninth Circuit's certified question of state law has unquestionably committed the courts of California to deny VGV any relief against the State under state law, VGV was not required to seek relief against the State in state court under state law. Where, as here, the State's highest court has already said "that there was no Fifth Amendment violation" the federal courts have jurisdiction to hear the Plaintiff's claims under the Fifth Amendment. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 851 (9th Cir.2001) (en banc) affirmed *Brown v. Legal Foundation of Washington,* 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003).

6. *ROOKER-FELDMAN* DOES NOT APPLY.

The limitation placed on the District Court's jurisdiction by the *Rooker-Feldman* doctrine is not of a Constitutional origin. Rather, it arises out of a pair of negative inferences drawn from 28 *U.S.C.* § 1331 (which establishes the District Court's original jurisdiction in civil actions arising under the Constitution, laws and treaties of the United States) and 28

U.S.C. § 1257 (which gives the United States Supreme Court exclusive jurisdiction to review final judgments or decrees rendered by the highest court of a State). *In re Gruntz v. County of Los Angeles*, 302 F.3d 1074, 1078 (9th Cir. 2000) (en banc) ("*Gruntz*"). The doctrine takes its name from two cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) ("*Rooker*") and *Feldman*, 460 U.S. 462 (1983), discussed above.

Rooker held that the district courts lacked jurisdiction to hear a case that turned on an issue of federal law that had been raised in a prior state court action if the state courts' ruling on federal law could have been reviewed by the United States Supreme Court under its appellate jurisdiction on a writ of certiorari in the prior case. (*Rooker, supra*, 263 U.S. at 415-416.) *Rooker* prevents a disgruntled litigant from foregoing certiorari review and then filing a subsequent action in district court challenging the state court's holding based on federal law. *Bianchi v. Rylaarsdam*, 334 F.3d 895 (9th Cir. 2003), upon which the State relied in the district court is a classic illustration of the type of suit prohibited by the *Rooker* branch of the doctrine.

Feldman held that *Rooker's* jurisdictional bar also prohibits a litigant from presenting his federal claims piecemeal before a different courts. Under this branch of the doctrine the district courts are prohibited from hearing a constitutional challenge to a state statute, that should have been, but was not, raised in the prior state or federal court action (*Feldman, supra*, 460 U.S. at 486-487) *with one very important caveat, to wit:* by definition, the doctrine cannot apply to a constitutional issue purportedly determined in the prior case if the United States Supreme Court lacked jurisdiction to review and correct that holding in the exercise

of its exclusive appellate jurisdiction under 28 *U.S.C.* § 1257 over the prior case.

If the California Supreme Court's purported holding that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment" was not subject to review and correction by the United States Supreme Court in the prior case against the District, *Rooker-Feldman* cannot possibly preclude either the District Court or this Court from reexamining this statement if necessary in the case at bar.

There was no issue in the case against the District as to whether a bankruptcy discharge could be construed as a taking in violation of the Fifth Amendment. The only relevance the Fifth Amendment had to the prior case was with reference to whether it would be appropriate to adopt a narrow construction of state law to avoid a construction of state law that could result in a taking. In that regard, *England v. Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 419-421 (1964) ("*England*") requires a litigant to disclose to the state court any constitutional concerns that would arise if a certain construction were adopted even though the litigant reserves the right to return to federal court for a final decision on the federal issues.

Once the Ninth Circuit certified the questions regarding the proper construction of the California taxing provisions to the California Supreme Court, *England* required VGV to make known to the California Supreme Court any potential concerns that might arise under the United States Constitution so that the California Supreme Court would have the benefit of those arguments in deciding whether it would be appropriate to adopt a narrow construction of the law to avoid those constitutional concerns.

As the United States Supreme Court later made clear in *Feldman* severe consequences follow from a litigant's failure to make the disclosure mandated by *England*. "[B]y failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court." *Feldman, supra,* 460 U.S. at 483.

VGV's briefs before the California Supreme Court demonstrate that VGV complied with *England* and *Feldman*. After devoting sixteen pages to a discussion of the proper construction of Article XIII A under state law, VGV devoted the next eight pages to the "constitutional concerns [that] would arise if proposition 13 was construed to have repealed state law governing the payment of judgments by local government." (Bracketed material added for clarity.)

Had VGV not briefed these issues before the California Supreme Court, it would have forfeited its right to raise the Guaranty Clause and Due Process Clause issues before the Ninth Circuit once the case returned there as well as its right to raise these outcome determinative issues on a Petition for Writ of Certiorari to the United States Supreme Court. Similarly, had VGV not briefed the Taking and Just Compensation concern, it may have forfeited its right to bring a just compensation claim against the State after the decision in favor of the District on the taxing issues became final on March 18, 2002 when the United States Supreme Court denied VGV's Petition for Writ of Certiorari.

Neither VGV nor the Ninth Circuit requested an advisory opinion from the California Supreme Court as to whether an action could be maintained against the State under the Fifth Amendment if state law prohibited a levy of local taxes to pay the just compensation awarded against the District. *Rooker-Feldman* does not deprive this Court or the District Court of

jurisdiction because the United States Supreme Court itself lacked appellate jurisdiction under 28 *U.S.C.* § 1257 to review, much less, correct the California Supreme Court's self serving *sua sponte* comment.

A few examples should suffice to make this point. In *Agins v. City of Tiburon* 24 Cal.3d 266, 273-274, 598 P.2d 25, 29, 157 Cal.Rptr. 372, 376 (Cal. 1979.) ("*Agins*"), the California Supreme Court offered a similar observation as to the scope of the Fifth Amendment when it held that the Fifth Amendment did not require payment of "just compensation" in cases that involved a temporary regulatory taking. The United States Supreme Court granted certiorari and upon review concluded that there was no taking at all under the Fifth Amendment and affirmed the California Supreme Court's decision, without commenting on the California Supreme Court's statement that the Fifth Amendment did not require just compensation for a temporary, regulatory taking. (See *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).)

Thereafter, it was requested on several occasions in other cases to consider the question but again declined to do so because consideration of that issue was not outcome determinative. See, e.g., *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); and *San Diego Gas & Electric Co.*, 450 U.S. 621, 631-632, 101 S.Ct. 1287, 1293-1294 (1981). It was not presented with an Article III case or controversy it had jurisdiction to consider, i.e., a case where that issue was outcome determinative until 1987. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250

(1987) ("*First English*"), the Supreme Court found "the constitutional claim properly presented in this case." It held that "the California courts have [since *Agins*] decided the [temporary taking] compensation question inconsistently with the requirements of the Fifth Amendment." *First English, supra,* 482 U.S. at 310-311. (Bracketed material added.)

The case at bar is the first case where the California Supreme Court's statement may be outcome determinative. The first time this question will be ripe for review by the Supreme Court, under its 28 *U.S.C.* § 1257 appellate jurisdiction, will be after the District Court has exercised its original jurisdiction under 28 *U.S.C.* §1331 to decide it.

The inapplicability of *Rooker-Feldman* to a federal Fifth Amendment claim against a state, based on a determination of state law by its highest court, is well-illustrated by the flurry of federal litigation arising out of the Hawaii Supreme Court's decision in *McBryde Sugar Co. v. Hawaii*, 54 Haw. 174, 504 P.2d 1330 (1973) ("*McBryde Sugar*"). In *McBryde Sugar*, the Supreme Court of Hawaii turned state water rights law on its head by declaring, *sua sponte*, that the state of Hawaii owned all the water in the Hanapepe River and adopting the common law doctrine of riparian rights as the law of Hawaii.

Faced with the potential loss of water rights by this unexpected pronouncement, the plaintiffs moved for rehearing in the Hawaii Supreme Court contending the decision had taken their vested water rights without compensation in violation of the Fifth Amendment. The Hawaii Supreme Court denied rehearing without addressing that federal claim. The United States Supreme Court subsequently denied three separate petitions seeking review of that decision on Fifth

Amendment grounds.[2] The Robinsons then filed suit in federal district court seeking an injunction prohibiting the enforcement of the state court *McBryde Sugar* decision on the grounds that it violated the Fifth Amendment. The district court agreed and issued an injunction prohibiting the State from enforcing that decision.

On appeal, Hawaii suggested that since the United States Supreme Court had denied certiorari to review the *McBryde Sugar* case, the *Rooker-Feldman* doctrine deprived the district court of subject matter jurisdiction to consider the Fifth Amendment taking issue. The Ninth Circuit, finding the doctrine applied, then created an exception to it based on the Hawaii Supreme Court's refusal to consider the Fifth Amendment issue. *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985) ("*RobinsonI*").

The United States Supreme Court granted Hawaii's petition for certiorari in *Robinson I* and (without briefing or oral argument) summarily vacated the Ninth Circuit's decision and remanded the case to the Ninth Circuit for further consideration in light of its landmark jurisdictional decision in *Williamson County*. See *Ariyoshi v. Robinson*, 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed.2d 560. By doing this, the United States Supreme Court made it unmistakably clear that the *Rooker-Feldman* doctrine would not bar a subsequent Fifth Amendment suit against a state in district court after the state's highest court had rendered a decision that could at some point result in the taking of private property for public

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[2] See *McBryde Sugar Co. v. Hawaii*, 417 U.S. 962, 94 S.Ct. 3164, 41 L.Ed.2d 1135 (1974); *Robinson v. Hawaii*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974); and *Albarado v. Hawaii*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974).

use without just compensation. On remand, the Ninth Circuit concluded that an action against the state was not barred by *Rooker-Feldman* but that it was premature because a final definitive "taking" as required by *Williamson County* had not yet occurred. *Robinson v. Ariyoshi*, 887 F.2d 215, 216 (9th Cir.1989) (*Robinson II*).

The history of *Robinson I* and *Robinson II* and the Supreme Court's interjection of its *Williamson County* decision in that dispute, as well as the history leading to the overruling of the California Supreme Court's *Agins* rule, make it perfectly clear that the *Rooker-Feldman* doctrine does not deprive the District Court of jurisdiction over VGV's Fifth Amendment taking claim.

7. CONCLUSION.

For the reasons stated above, the judgment of the District Court should be reversed with direction to enter a partial summary judgment in Plaintiff's favor on the State's sovereign immunity, statute of limitations, failure to exhaust state remedies and *Rooker-Feldman* affirmative defenses.

DATED: February 20, 2004.

Respectfully submitted,

HEILY & BLASE
A Professional Law Corporation

By _____
JOHN R. JOHNSON
Attorneys for Plaintiff
Ventura Group Ventures, Inc.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned, counsel of record for Appellant Ventura Group Ventures, Inc. hereby certifies that there are no other cases pending before this Court that are related to this case.

DATED: February 20, 2004.

HEILY & BLASE
A Professional Law Corporation

By _____
JOHN R. JOHNSON
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Ventura Group Ventures, Inc.

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 32(a)(7) (C)(I)

I certify that the attached brief uses proportionately spaced type, has a typeface of 14 points or more, and contains 7,334 words.

DATED: February 20, 2004.

HEILY & BLASE
A Professional Law Corporation

By _____
JOHN R. JOHNSON
Attorneys for Plaintiff
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I am employed in the City and County of Ventura, State of California. I am over the age of 18 years, not a party to the action herein, and my business address is 590 Poli Street, Ventura, California 93001-2633.

On February 20, 2004, I served the foregoing document described as APPELLANT'S OPENING BRIEF (Appellant's Excerpts of Record, Vols. 1-4 served and filed concurrently herewith) on the interested parties to this action.

[X] **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon, fully prepaid, in the United States mail at Ventura, California;

[X] **BY OVERNIGHT DELIVERY**: I caused such envelope(s) to be delivered to the U.S. Court of Appeals for the Ninth Circuit by overnight, next business day delivery service.

I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on this 20th day of February, 2004.

_____
Joi Kawaguchi Searson, CLA

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